Dated in 18—6 1864 Davis—
18th
Affirmed. Judge Hunt
Dissl

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~874~~ 102

WILLIAM S. SHREWSBURY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 2, 1872.

~~Dec. 1873~~

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APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	9	6
Amendment to petition	10	6
Final judgment by the court	11	7
Application of claimant's counsel for allowance of an appeal	12	7
Order of the court allowing the same	12	7
Findings of fact and conclusion of law filed by the court	13	8
Prayer for findings filed by claimant's counsel	19	9
Prayer for findings filed by defendants' counsel	22	10
Certificate	24	11

1 *Petition.—Filed February* 13, 1869.

U. S. Court of Claims.—December term, 1868.

WM S. SHREWSBURY
vs.
THE UNITED STATES. } 5222.

To the honorable Court of Claims:

The petition of William S. Shrewsbury, a citizen of the United States, respectfully represents:

That, in the month of March, A. D. 1865, he entered into a written contract with Colonel J. A. Potter, a quartermaster acting for and on behalf of the United States for the transportation of Government stores upon route No. two, west of the Missouri River. A copy of this contract and of the tabular statement referred to in it, is hereto annexed and marked "Exhibit A," and claimant prays may be considered and read as a part of this petition.

Petitioner further shows that, immediately upon the execution of said contract, he provided himself with all the necessary means of transportation and all other requisites to carry out the same upon his part, and he avers that at all times during the existence of said contract he complied with all the stipulations on his part to be performed, and was ready and willing to transport all freight and merchandise which might be required of him by the officers of the United States.

Petitioner further shows, that in entering into the said contract he assumed great responsibilities and incurred heavy expenses, relying upon the profits which he would make in transporting such freight at the prices agreed upon; that, by the terms of the said contract he became entitled to transport all of the military stores and supplies which the United States might require transportation for on the route and during the time specified in said agreement, excepting only such supplies as the Government might transport by its own means of conveyance.

That, in violation of this contract and of the rights of your petitioner under it, the officers in charge of the United States military
2 depot at Fort Leavenworth, in the State of Kansas, in the month of , procured the transportation of one million pounds of Government military stores from the said Fort Leavenworth to Fort Union, in the Territory of New Mexico, under a contract or arrangement with one Fuller, and not by the use of the Government means of transportation.

Petitioner further shows, that if he had transported the said one million pounds of freight under the terms of the said contract, as he was entitled and was ready and prepared to do, he would have received therefor the sum of one hundred and sixty thousand dollars, ($160,000;) that the necessary and reasonable expenses for the transportation of said freight would have been ninety thousand dollars, ($90,000.)

That the difference between the sum which he would have been entitled to receive and the reasonable expense of performing the service, viz, the sum of seventy thousand dollars, ($70,000,) is the amount of damages which he has sustained by the said breach of the said contract on the part of the United States.

Your petitioner further shows that he has at all times borne true allegiance to the Government of the United States, and that he has not

in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and he prays the judgment of this honorable court for the said sum of seventy thousand dollars, ($70,000.00,) and for such other and further relief as the nature of the case may show he is entitled to.

ANDREW STUART,
Attorney for Petitioner.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Andrew Stuart, above named attorney-in-fact, being duly sworn, deposeth that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition is stated; that claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

ANDREW STUART.

Sworn and subscribed to before me, clerk of the supreme court in and for said District.

3 Witness my hand and the seal of said court, 3rd day of February, A. D. 1869.

[SEAL.]

R. J. MEIGS,
Clerk Sup. C't, D. C.

Claimant's address is—

Claimant's solicitors—
HUGHES, DENVER & PECK,
258 *G Street, Washington, D. C.*

EXHIBIT A.

This agreement, made and entered into this 27th day of March, one thousand eight hundred and sixty-five, by and between Col. J. A. Potter, quartermaster U. S. Army, on the authority and by direction of the Secretary of War, for and on behalf of the United States, of the first part, and William S. Shrewsbury, of Council Grove, Morris County, in the State of Kansas, of the second part, for himself, his heirs, executors, and administrators, witnesseth:

That the said parties have covenanted and agreed, and by these presents do covenant and agree, to and with each other as follows, viz:

ARTICLE I. That the said William S. Shrewsbury shall receive at any time, in any of the months from May to September, inclusive, during the year one thousand eight hundred and sixty-five, from the officers of the Quartermaster's Department, at Forts Leavenworth and Riley, in the State of Kansas, and the town of Kansas, in the State of Missouri, all such military stores and supplies as may be turned over to him for transportation, in good order and condition, by the officer or agent of the Quartermaster's Department, at any or all of the above-named points or places, and transport the same with all practicable despatch, and deliver them in like good order and condition to the officer or agent of the Quartermaster's Department on duty, or designated to receive them at Fort Union, in the Territory of New Mexico, or any other depot that may be designated in that Territory; at any posts or stations that are or may be established in the State of Kansas, or in the Territory of Colorado, south of latitude 40° north; at Fort Garland, or any other point

or post on the route; agreeably to the instructions he may receive from an officer or other authorized agent of the Quartermaster's De-
4 partment charged with the duty of forwarding the stores and supplies at Fort Leavenworth, or other place of departure; and for the faithful performance of such service he shall be paid in the manner hereinafter provided for in article 14 of this agreement, and at the rates specified and shown in the tabular statement hereto annexed, and signed by the parties to this agreement, which statement is considered as part hereof.

ARTICLE II. That the said William S. Shrewsbury agrees and binds himself, his heirs, executors, and administrators, to transport, under this agreement, from the post or depots named in Article I, or from and to any other post or depot that may be established within the district named in said article, any number of pounds of military stores and supplies, from and between one hundred thousand pounds and fifteen millions of pounds in the aggregate.

ARTICLE III. For the stores to be forwarded from Forts Leavenworth and Riley, or from any other point of departure on the Missouri River, notice shall be given to said William S. Shrewsbury, at his place of business or agency in the vicinity of Fort Leavenworth, Kansas.

ARTICLE IV. In order that the said William S. Shrewsbury shall be in readiness to meet the demands and requirements made upon him for transportation, under this contract and agreement, due notice shall be given him or his agent, of the quantity and kind of stores to be transported at any one time; at what points the stores will be ready for delivery to him, and of the place of their destination, subject to such change as may be decided upon while in transitu, as herein provided for, that is to say: for any quantity less than three hundred thousand pounds, twenty days' notice; for any quantity between three hundred thousand and six hundred thousand pounds, twenty-five days' notice; for any quantity between six hundred thousand and one million of pounds, forty days' notice; for any quantity between one million of pounds and two millions five hundred thousand pounds, fifty days' notice; for any quantity between two millions five hundred thousand pounds and five millions of pounds, sixty days' notice.

ARTICLE V. The military stores and supplies which shall be transported under Article I of this agreement, destined to Fort Union, or other depot that may be designated in the Territory of New Mexico, or to points beyond, shall be consigned to Fort Union or such other
5 depot; and receipts shall be given by the officer of the Quartermaster's Department serving at the place of consignment, for the full amount of stores that shall be delivered; and upon such receipt payment shall be made to the said William S. Shrewsbury, as hereinafter provided.

ARTICLE VI. That all the means of transportation to be used by the said William S. Shrewsbury, under this agreement, shall be submitted to the inspection of the officer or agent of the Quartermaster's Department at the place of departure, and such only shall be used as may be then and there accepted by him, provided that the said William S. Shrewsbury shall be authorized to employ mules or cattle as he may elect.

ARTICLE VII. That, to ensure the delivery of the stores, and to aid the contractor in the execution of his agreement, certificates, setting forth the number of the train, the number of wagons in it, and the condition of the train for the prosecution of the journey, shall be given by the officers or agents of the Quartermaster's Department at the following

points, to wit, at Fort Riley and Fort Larned. Upon each certificate so given, setting forth the good condition of the train, payment shall be made to the contractor for the service rendered to that point; and upon arrival of the train at the place of destination or delivery the officer or agent of the Quartermaster's Department at the point of delivery shall endorse the bill of lading, in accordance with the finding of a board of survey, as hereinafter provided, stating the quantity and condition of the stores delivered, upon which endorsement payment shall be made, as per contract, deducting the amount of any payment or payments previously made, and also the value of any articles missing, lost, destroyed, or damaged, and which the board of survey may find to be properly chargeable to the contractor.

ARTICLE VIII. In all cases where stores have been transported by the said William S. Shrewsbury, under this agreement, a board of survey shall be called without delay, upon their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage, to investigate the facts, and report the apparent causes, assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control; and these proceedings, a copy of which shall be furnished to the contractor,
6 shall be attached to the bill of lading, and shall conclude the payments to be made on it. For loss of weight due to shrinkage, or for leakage of vinegar or molasses, or other liquids, the contractor shall not be liable, if the packages are delivered in good order and condition; and the board of survey shall be satisfied that such shrinkage or leakage did not arise from neglect or want of care on the part of the contractor or his agents. For deficiencies or damages, the contractor shall pay the cost at the point he receives the articles, and freight shall be deducted in the latter case in proportion to the amount of drainage assessed. Should no board of survey be called, through failure on the part of the Quartermaster's Department or other military authority to convene one, it shall be considered that the contractor has delivered all the stores, as specified in the bill of lading, in good order and condition, and he shall be paid accordingly. If the amount of loss, deficiency, or damage exceeds the value of the bill of lading, it shall be deducted from any after payments that may become due. Transportation to be paid, in all cases, according to the actual distance travelled from the place of departure to that of delivery, the distance to be endorsed on the bill of lading by the officer or agent receiving the supplies.

ARTICLE IX. That, in case any one or more of the trains of the said William S. Shrewsbury are stopped or delayed at any time or place exceeding two days, either under the orders of an officer of the Quartermaster's Department or the commanding officer of a post, or of troops present, or by any other act on the part of the Government or its agents, the contractor shall be paid, upon a statement in writing procured from the officer or agent of the Government causing the delay, the sum of five dollars per diem for each and every team in the train for each and every day they may be so delayed; and in case the officer or agent of the Government aforesaid shall refuse to furnish such statement in writing, then the delay shall be paid for as above, on affidavits or other satisfactory evidence of credible and competent witnesses. All orders from officers or agents of the Government to halt trains shall be given to the contractor or his agents in writing, expressing fully the reasons therefor.

ARTICLE X. That the said William S. Shrewsbury shall be fur-
7 nished with a suitable escort for the protection of the supplies,

should he be required to transport in any one train a less quantity than one hundred and twenty-five thousand pounds; but whenever required to transport one hundred and twenty-five thousand pounds or more, then no escort shall be furnished.

ARTICLE XI. That the said William S. Shrewsbury shall transport all the military stores and supplies for which the Quartermaster's Department may require transportation by contract, on the route specified by this agreement, during the year one thousand eight hundred and sixty-five, provided the weight of such military stores and supplies shall not exceed in the aggregate fifteen millions of pounds; yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so.

ARTICLE XII. That, in case of failure by reason of deficiency in the quality or quantity of the means of transportation furnished, or from any other cause on the part of the said William S. Shrewsbury, to be in readiness to meet the demands and requirements made upon him for transportation, under this contract or agreement, after due notice shall have been given him or his agents, as provided for in Article IV of this agreement, then the officer or authorized agent of the Quartermaster's Department charged with the duty of forwarding the stores and supplies, shall have power to supply the deficiency, either by purchase, hire, or special contract, as the said officer or agent may elect, and the said William S. Shrewsbury will be charged with difference of cost or expense thus incurred.

ARTICLE XIII. It is further understood that, if at any time stores or supplies are required to be transported back to any point on the road, or to any of the original points of departure included in this agreement, they shall be carried back at the same rate per hundred pounds per hundred miles, as provided for by said agreement for the month in which said stores were loaded.

ARTICLE XIV. For and in consideration of the faithful performance of the stipulations of the agreement, the said William S. Shrewsbury shall be paid at the office of the Quartermaster's Department, at Fort Leavenworth, Kansas, according to the rates specified in the tabular statement hereto annexed, signed by the parties to this agreement, in the legal currency of the United States.

8 ARTICLE XV. It is expressly agreed and stipulated between the parties to this contract that, upon mutual agreement, it may be changed, altered, modified, or abrogated, in whole or in part.

ARTICLE XVI. It is expressly understood that no member of Congress shall be admitted to any share or part in this contract or agreement, or derive any benefit to arise therefrom.

In witness whereof, the undersigned have hereunto placed their hands and seals, at Fort Leavenworth, Kansas, the day and date above written.

(Signed) J. A. POTTER *Col. & Q. M.* [SEAL.]
WM S. SHREWSBURY. [SEAL.]

TABULAR STATEMENT.

Schedule of prices per one hundred (100) *pounds per one hundred* (100) *miles, to be paid William S. Shrewsbury, contractor for the transportation of military stores and supplies, under an agreement between Col. J. A. Potter, quartermaster U. S. Army, and William S. Shrewsbury, dated Fort Leavenworth, Kansas, the 27th of March,* 1865.

Route.	Points of starting.	Periods of starting.				
		May.	June.	July.	August.	Sept'r.
No. 2.....	From and to points and places named in Art. I of above agreement.	$2 05	$2 05	$2 05	$2 05	$2 05

9 In the United States Court of Claims. December term, A. D. 1868.

WM S. SHREWSBURY
vs.
THE UNITED STATES. } No. 5222.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of seventy thousand dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney-General.

Filed May 25, 1869.

10 U. S. Court of Claims. December term, 1870.

Amendment to petition.—Filed Feb'y 7, 1872.—*J. R.*

WILLIAM S. SHREWSBURY
vs.
THE UNITED STATES. } No. 5222.

Now comes the said claimant, and by leave of court, first obtained, amends his petition heretofore filed in this cause, by showing further that, for the purpose of fulfilling the said contract he associated with himself Andrew Stuart, Preston Roberts, Samuel Slemmons, (now deceased,) Chauncy Dewey, Joseph C. Irwin, Geo. W. Howe, David W. Powers, Henry L. Newman, A. & P. Byram, and John Kerr, who acted under the firm-name of Shrewsbury, Slemmons & Co., and in the event of a recovery of the judgment, prays the petitioner will be required to account to his associates for their respective interests.

And petitioner further shows, that said Andrew Stuart was the active

manager of the business of the said firm and alone controlled and conducted its business; and further, that all of the said associates of the claimant have always borne true allegiance to the Government of the United States, and have never given aid or comfort to rebellion against the same.

Andrew Stuart being duly sworn, deposeth that he is the agent of the claimant, and that he believes the facts as stated in said amended petition are true.

ANDREW STUART.

Sworn to and subscribed before me this 30th day of January, A. D. 1871.

E. J. KLOPFER, *J. P.*

11 In the Court of Claims.

WILLIAM S. SHREWSBURY } 5222.
vs.
THE UNITED STATES.

At a Court of Claims held at the Capitol in the city of Washington, fifth day of February, A. D. 1872, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants: and do order, adjudge, and decree that the said claimant, William S. Shrewsbury, take nothing by his suit, and that his petition be dismissed.

By the court.

12 In the United States Court of Claims.

WILLIAM S. SHREWSBURY } 5222.
vs.
THE UNITED STATES.

The petition of W. S. Shrewsbury respectfully represents that he is informed and believes there is error to his prejudice in the judgment lately rendered against him in the above-named cause, from which he desires to appeal.

Wherefore he prays an appeal may be allowed him in this case to the Supreme Court of the United States.

CHARLES F. PECK.
By T. J. D.
THOMAS J. DURANT,
For Petitioner.

Filed in the clerk's office March 11, 1872.

MARCH 11, 1872.

Ordered that the appeal in the case of William S. Shrewsbury vs. The United States, No. 5222, be allowed as prayed for.

By the court.

13 Court of Claims.

WILLIAM S. SHREWSBURY } 5222.
vs.
THE UNITED STATES.

Findings of fact & conclusions of law.—Filed Feb'y 5, 1872.

The court, having examined & considered the evidence in this case, find the facts therein to be as follows:

1. The claimant and Col. J. A. Potter, quartermaster U. S. Army, on the 27th day of March, 1865, entered into the written agreement annexed to and made part of the petition, as the foundation of this action.

2. Under the said agreement, the total amount of stores furnished to the claimant by the Quartermaster's Department for transportation, within the period of time specified therein, was fourteen million two hundred & two thousand eight hundred & eleven pounds; for the transportation of all of which he has been fully paid.

3. The claimant was fully prepared with the means of transportation, and ready to transport the remainder of the fifteen million pounds which, under said agreement, he contracted to carry; but it was not furnished him for transportation.

14 4. On the 29th day of September, 1865, Brevet Colonel M. R. Morgan, commissary of subsistence, U. S. Army, at Fort Leavenworth, Kansas, entered into a contract with A. N. Fuller and John Tiernan to deliver at Fort Union, in the Territory of New Mexico, eighteen thousand bushels of corn, on or before the 20th day of December, 1865, which contract was in the words and figures following, to wit:

"This contract, made and entered into at Fort Leavenworth, Kansas, on the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and sixty-five, by and between Brevet Colonel M. R. Morgan, commissary of subsistence, U. S. Army, for and on behalf of the United States of America, of the first part, and A. N. Fuller and John Tiernan, of the city and county of St. Louis, in the State of Missouri, of the second part, witnesseth: That the said parties of the second part agree to deliver at Fort Union, in the Territory of New Mexico, eighteen thousand (18,000) bushels of shelled corn, of the best quality, well sacked in new gunny-sacks, securely sewed with linen twine; said corn must be free from dirt, cobs, or other foreign matter, and must be either yellow or white, but not mixed in the sacks; to be de-

15 livered to the officer of the Subsistence Dep't at Fort Union, N. M., on or before the 20th day of December, 1865.

"The parties of the second part agree that the said corn shall be subject to the inspection, acceptance, or rejection of the officer receiving the same, and that if default shall be made by the said parties of the second part, or either of them, in the time of delivery, or any of the terms of this contract, the party of the first part, or any person acting for him on behalf of the United States, shall have power to purchase the corn in open market, and the said parties of the second part, and their sureties, shall be charged with the difference between the cost thereof and the price hereinafter stipulated to be paid to the said parties of the second part.

"The parties of the second part further agree that, if default shall be made by them in any of the terms of this contract, that any sum or sums of money due or to become due them or either of them by the United States of America, shall be held and applied to satisfy any damage that may accrue to the United States by reason of such default. For and in consideration of the faithful performance of the stipulations of this contract, the said party of the first part agrees

16 to pay or cause to be paid to the parties of the second part, at the office of the commissary of subsistence at Fort Leaven-

worth, Kansas, the sum of eight dollars and fifty-four cents ($8.54) for each and every bushel of corn delivered and accepted in accordance with the terms thereof, in such funds as may be provided by the Government for that purpose, payment to be made on vouchers issued and certified by the officer receiving said corn.

"It is especially understood between the parties to this contract that no member of Congress, officer or agent of the Government, or any person employed by the Government of the United States, shall be admitted to any share or part therein, or any benefit to arise therefrom."

5. The said contract was entered into by said Morgan with said Fuller & Tiernan, in pursuance of an order received by the former from Colonel T. J. Haines, commissary of subsistence at St. Louis, Missouri, requiring said Morgan to send corn to New Mexico to the amount of about one million pounds. It being too late in the season for said Morgan to advertise for proposals for said corn, & to purchase
17 the corn under advertisement in time to send it out by the Government freighter, and, having an offer from Fuller & Tiernan, who were then furnishing corn to the Quartermaster's Department at Fort Leavenworth, to deliver the corn required for the Subsistence Department at Fort Union, entered into the said contract with them.

The said corn was to be sent to said fort, not for the Army, but to feed Mexicans or Indians.

6. The said Morgan hurried the said Fuller to start the corn off, and the said Fuller borrowed from the quartermaster of Fort Leavenworth some of the corn he was delivering to him; the said quartermaster loaning the corn to said Fuller & Tiernan, to accommodate the Subsistence Department, and to enable them to commence on their contract sooner than they could do if they had to wait to get the corn from St. Louis.

The quantity of corn so loaned by the Quartermaster's Department to Fuller & Tiernan was about one-half of the million pounds which they contracted to deliver at Fort Union; and the amount loaned to them was afterwards returned by them, in kind, to the Quartermaster's Department at Fort Leavenworth.

18 7. The said Fuller & Tiernan delivered at Fort Union eight hundred and fifty-eight thousand pounds of corn, all of which was received by the Government on their contract. About one hundred and twenty thousand pounds of the corn they shipped for Fort Union was stopped and taken by the Government at Fort Dodge.

8. The claimant did not give aid or comfort to the late rebellion against the United States, but consistently adhered, & bore true allegiance, to the United States.

The conclusion of law is that the claimant's petition be dismissed.

By the court.

19 U. S. Court of Claims. December term, 1871.

W'M S. SHREWSBURY
vs.
THE UNITED STATES. } No. 5222.

Be it remembered that, on this 31st day of January, 1872, C. F. Peck, solicitor for the claimant, moves the honorable court to find specifically in this case the following facts, viz:

First. That the contract as set forth in the petition was entered into between the claimant and the defendant on the day and date set forth.

Second. That the claimant, as soon as the said contract was entered

into, prepared himself to carry out and perform the same fully on his part, and of this the defendant had notice.

Third. That while the said contract was running, and before the claimant had been called upon to carry the amount of supplies mentioned in his contract, the defendant procured transportation from Fort Leavenworth to Fort Union, over route two, as described in said contract, 800,000 pounds military supplies, by contract, and not by the
20 claimant's means of transportation; that said 800,000 pounds supplies was included within the 15,000,000 pounds named in claimant's contract; that 560,000 pounds of said supplies were delivered by the quartermaster at Fort Leavenworth to Fuller and Tiernan, for transportation thence to Fort Union, under an accommodation arrangement between the said quartermaster and the commissary of subsistence at Fort Leavenworth, who was charged with the duty of sending all of said supplies to Fort Union, said accommodation arrangement having been entered into in part in order to avoid the payment by defendants of so high rates of transportation as the claimant was entitled to receive.

Fourth. That the distance these supplies were carried from Fort Leavenworth on said route, was $771\frac{89}{100}$ miles, and that the claimant was prepared and the defendants notified thereof, to carry said supplies from Fort Leavenworth to Fort Union; and that he was prepared so to do, at a cost to himself of ten cents per pound.

Upon the aforesaid prayer for findings by the claimant, the court makes the following endorsement:

21 First & second. Refused, because embodied in the findings by the court.

Third. Refused, because not supported by the evidence, except so far as the facts therein stated are stated by the court in its findings.

Fourth. Refused, as irrelevant.

A true copy.

(Indorsed:) 5222. W'm S. Shrewsbury vs. The United States.

22 United States Court of Claims. December term, 1871.

W. S. SHREWSBURY *vs.* THE UNITED STATES. } No. 5222.

And now comes the defendant, by the Attorney-General, and requests that the honorable court make finding of the following facts, viz:

1. That two vouchers for transportation of military stores on route No. 2, under the contract of March 27, 1865, were paid on Jan'y 19, 1867, and Jan'y 28, 1867, amounting to $8,210.05, and $330.00 respectively, to the claimant by Brigadier-General J. A. Potter, A. Q. M., and he receipted in full therefor.

2. That the Third Auditor certifies to the fact that these vouchers were the final payments on the contract of March 27, 1865.

3. That these vouchers were given subsequent to the alleged breach of contract set up by the claimant.

23 4. That no protest, or any other claim not specified in these vouchers, was made when the receipt in full was given.

5. That it was a final settlement on the contract of March 27, 1865, a breach of which is alleged.

6. That the claimant's contract was for such transportation as the Quartermaster's Department might require.

7. That the Subsistence Department made the contract with Fuller & Co., the same which is alleged to be a breach of the claimant's contract.

8. That the contract with Fuller & Co. was for the delivery of corn at Fort Union, New Mexico.

9. That the corn was to be accepted by the agent of the Government at Fort Union only, if the terms of the contract as to quality, time, &c., should be complied with.

WILLIAM McMICHAEL,
Ass't Att'y-Gen'l.

Upon the foregoing prayer of defendants for findings, the court makes the following endorsement, to wit: Refused.

A true copy.

24 In the Court of Claims.

WILLIAM S. SHREWSBURY
vs.
THE UNITED STATES. } No. 5222.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the claimant's counsel for the allowance of an appeal, as filed in the clerk's office March 11, 1872, and of the order of the court allowing the same; of the findings of fact and the conclusion of law thereon, upon which the court founded its judgment; and also the prayers of the claimant and defendants for findings, with the endorsements made thereon by the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this first day of April, A. D. 1872.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 374. William S. Shrewsbury, appellant, vs. The United States Court of Claims. Filed 2d April, 1872.

In the Supreme Court of the United States.

October Term, 1873.

WILLIAM S. SHREWSBURY
vs.
THE UNITED STATES.
No. 162.

Brief for Plaintiff and Appellant.

Plaintiff appeals from a judgment of dismissal. He alleges that he had a special contract with defendants to transport all the military stores and supplies on the route and for the time specified therein, except by defendants' own means of conveyance; and that in violation of this contract, defendants procured transportation for a million pounds by a contract with one Fuller, and not by the use of the Government's means of transportation. That plaintiff's damages amount to $70,000. For this breach of contract and for this sum he prays judgment.

Rec., pp. 1, 2.

The answer to this petition was a general denial.

Rec., p. 6.

ASSIGNMENT OF ERRORS.

First. The lower court erred in dismissing the petition and in not giving judgment for the sum of $46,444.19 in favor of the plaintiff.

Second. And in confusing the boundaries of the two branches of the Department of War, namely: the Quartermaster's Department, and the Commissary-General of Subsistence Department.

Third. And in treating as a real contract of sale what was in fact not only a sale but a bailment, *locatio operis merciun vehendarum.*

Fourth. And in giving effect to both sale and bailment when both were illegal throughout, and enabling the Government agents to do indirectly what they are forbidden to do directly.

Fifth. And by drawing erroneous inferences from plain facts, and applying improperly the principle that fraud must be proved.

There is no dispute as to plaintiff's contract. The alleged violation took place thus: Col. Haines, Commissary at St. Louis, sent an order to Commissary Morgan to send to Fort Union, N. M., 1,000,000 pounds of corn. But there being no corn in the Commissariat's possession, Col. Morgan buys from Fuller and Tiernan, of St. Louis, 18,000 bushels of corn, *payable and deliverable at Fort Union*, at eight dollars fifty-four cents a bushel, ($8.54,) [that is, $1.25 for the corn, and $7.29 for the transportation.] (See contract, p. 8, Record.) If this corn had been bought at Leavenworth for the same price per bushel, $1.25, and transported, as it should have

been, under plaintiff's contract, it would have cost the United States $10.03.

1,000,000 lbs. for 771 miles, @ .0205	$158,055
Say 18,000 bushels, @ $1.25 at cost	22,500
	$180,555
Under Colonel Morgan's arrangement it would have cost the United States—18,000 bushels @ $8.54	153,720
Difference in favor of United States	$26,835

The appellant relies on the facts as stated in the opinion of the Court of Claims in this case (7 Ct. Clms. Rep., 374) and in this Record on pp. 8, 9.

ARGUMENT.

The Quartermaster's Department provides "all necessary "quarters and *transportation for all army supplies, army* "*clothing, camp and garrison equipage, cavalry and artil-* "*lery horses, fuel, forage, straw, and stationery.*"

2 S. L., 696, Act March 28, 1812, sec. 3.
5 " 513, " August 23, 1842, sec. 3.

In accordance with these laws, the contract for "*all the* "*military stores and supplies* for which the Quartermaster's "Department may require transportation by contract" was made in due form of law with the plaintiff. Both the acts of March 3, 1849, (9 S. L., 415,) and March 3, 1863, (12 S. L., 743,) entered into and formed part of the claimant's contract with the United States. The claimant and all the means of transportation used by him (article VI of his contract) became

a part of the military service of the Government, which protects itself, in various ways, by the terms of its agreement, from any loss or damage to the military service arising from the FAULT of the contractor.

We submit that the transportation of the corn in question from Leavenworth to Fort Union belonged *exclusively* to the Quartermaster's Department.

The Commissary Department purchases and issues to the army such supplies as enter into the composition of the ration.

3 S. L., 427, Act April 14, 1818, sec. 6.

Admit that corn, *a. g.*, is an accidental part of a ration, the right to purchase and issue it may be conceded to the head of the Commissary Department, *under the direction of the Secretary of War*, (3 S. L., 427, sec. 7,) provided it be done in conformity to law.

And by section 8 of the same act, the officers of the *Commissariat* are forbidden to be concerned, directly or indirectly, *in the purchase or sale, in trade or commerce*, of any article entering into the composition of the ration.

We submit that transportation of the elements of the ration from Leavenworth to Fort Union, $771\frac{89}{100}$ miles, is not vested in but excluded from the Commissary Department of the Government, unless expressly authorized by the Secretary of War.

Second. Hence, the indirect employment of two outsiders to transport the "army supplies" of *corn*, admitting that article to be an accidental element of the ration, was contrary to law and an invasion of the duties of the Quartermaster's Department. But the entire contract made by the Commissary Department with these outsiders is otherwise stricken with absolute nullity. Because—

(*a.*) There was *in fact* no emergency to justify the contract, more than half of the required corn being on hand and not wanted in the Quartermaster's Department at the time, and found by the lower court to be *loaned* to outsiders! which is, to say the least, a novel disposal of the Government's property;

(*b.*) Because no emergency is provided for in cases when the supplies are necessary to feed Mexicans or Indians, especially in times of peace and free intercommunication;

(*c.*) No order from the Secretary of War is exhibited;

(*d.*) Nor can a contract for corn and for its transportation be mixed up together;

(*e.*) Nor was the corn bought openly, at the place or in the way it is usually bought and sold;

12 S. L., 220, sec. 10.

(*f.*) And even if all these objections could be answered satisfactorily, there still remains the contract, call it what you please, a contract of sale, or bailment, or a mere agreement, which if otherwise binding, is admittedly not a cash transaction at all, in any mercantile or legal sense whatever, but a contract on several suspensive conditions, and which has a time or term given or limited for its performance. The law as to emergencies requiring the immediate procurement of supplies can by no reasonable interpretation be made to sanction any such transaction as this on the part of the Commissariat.

Third. Nor can it be validly argued that the corn was not the property of the United States. Part of it was illegally

loaned to the outsiders; and about this portion there can be no question. If there was any *commixtio*, the mass became entirely the Government's property until the separation was made. The Government treated the whole of it as their property, and took a part of it *en route*, leaving the outsiders to get their money the best way they could. This is not surprising, considering how devious the whole transaction was.

But whether the whole 18,000 bushels were the property of the United States or not, it is indisputable that the portion of it *loaned* by the Quartermaster's Department to the outsiders remained the property of the Government. The ownership was never changed. This portion of United States corn belonging to the Quartermaster's Department was transported over plaintiff's route; and no sophistry can elude the conclusion that the defendants should have employed the plaintiff to transport it under their contract with him. Either the loan of the 10,000 bushels was good or bad; if good, the Government could not avoid its transportation by plaintiff without a gross breach of contract; if bad, as it unquestionably was, it defrauded plaintiff and made the Government liable in damages.

It is suggested that the case is one governed by the principles of the law of mandate; and this we fully concede. But the legal relation of principal and agent requires both parties *honeste vivere, neminem lædere, suum cuique tribuere.* If a principal employed two agents in two distinct and separate spheres of action, he could not, by any devious arrangements between his agents, violate these fundamental principles of justice.

Besides, the claimant was, with all his means of transportation, a portion of the War Department; they had been all examined by the officers of the United States, and found worthy of the service; nothing had been left undone by them to

secure the Government from an active failure of the claimant to perform his contract of transportation; and in many cases he was to be provided with military escort. All these important matters show the design of the Government to be to secure the performance of their contracts rather than to hold the contractor liable for damages in case of non-performance. Not only does the Commissariat's contract with the outsiders violate this intention, but the Mexicans and Indians might have starved for want of the corn, had the outsiders found any intermediate purchaser before reaching Fort Union. No corn was to be bought at Fort Leavenworth; *á fortiori*, there was none at Fort Union. But in case of a failure of the outsiders to deliver, the United States had power "to purchase the corn "in open market!" What, in this event, were the Mexicans and Indians to do to avoid starvation?

Fourth. The agreement with the outsiders is a mere pretence. The United States officer admits that he knew of plaintiff's contract with the Government for the transportation, for he specifies its terms, and bases his action in contracting with Fuller & Tiernan upon an "EMERGENCY," and "BECAUSE IT WAS CHEAPER." Where the price of corn is $1.25, and its transportation $7.29 per bushel, a contract to deliver is six-sevenths of it "*transportation*," and one-seventh *corn;* but where the agreement is one-seventh valid, and six-sevenths void on well-settled principles of public policy, the whole is void. Here, the agreement simulates a sale on delivery, when it is mainly a bailment; and by confusing the two, it violates the clear spirit of the law. (14 S. L., p. 73, § 3, act of June 23, 1866.) And as to plaintiff, the agreement is fraudulent; not merely "*evasive and tricky*." We have exposed the deceitful allegation of "*emergency*" when more than half of the ordered corn was in the Quartermaster's Department, and was *loaned* to the outsiders; but to adopt the

doctrine that it is any part of an officer's duty "to save "money" to the Government by a devious arrangement, is to degrade the science of war and convert its generals into "great arithmeticians." Such a principle would debase the service and destroy the Republic.

Is it true that the alleged arrangement was made "to save "money" to the Government? The Subsistence Department could make no contract, not even on an emergency, *without the order of the Secretary of War.* (1 S. L., p. 610, § 3.) Under the facts, there being no emergency, and more than half being Quartermaster's corn—loaned under the circumstances illegally, the contract with the outsiders, made without competition or advertisements, gives rise to the presumption of *omnia contra spoliatorem*, with the additional presumption, that he who is in illegal possession of trust-property will err in the management of it. The question is one of law for the Court. To our minds, *res ipsa loquitur.* Human judgment may be perverted and human conduct corrupted by many things besides money. The Subsistence Department benefitted the outsiders by contracting with them, well knowing the rights of the plaintiff and intending to violate them. If this irregular transaction is sustained, the plaintiff's contract with defendants is good for nothing; for what is to prevent the two Departments of Quartermaster and Commissary to combine, and prevent, by just such an arrangement as this, all transportation over plaintiff's route? It is only necessary to disguise the contract a little, and the result is accomplished.

1st. In looking over the argument of the Court of Claims in this case, the erroneous principles ruling it will be readily discovered. We admit that the Commissariat and Quartermaster's Department are separate and distinct; but we go a step further and say *that they should be kept so.* We maintain that the Commissariat has no right to make a contract for

the furnishing of commissary stores at a given point, when saving money to the United States is the solely avowed object, and the intended result is a loss to a contractor with the Quartermaster's Department. It is impossible to doubt that the Commissariat should have abstained from making the contract in question.

2d. Nor can the Quartermaster's Department set up *its* act that not having the corn, it made and could make no requisition for its transportation. Its act was prevention; and prevention is equivalent to performance.

Quoties per eum, De Reg. Jur., 161.

3d. It is alleged there was no contract for *the transportation* of the corn between the Commissariat and Fuller & Tiernan. The order is to *send* corn; the Commissariat was sending corn, and necessarily required transportation. But the contract is a *mere sham*, and claimant is not required to fight shadows.

4th. The corn was quartermaster's corn, in law and fact. As to the Government, the possession, right to possession and title in and to the corn were all in the United States. It is legally impossible to admit the premises laid down by the lower court, viz:

(*a.*) The corn belonged to the outsiders, and only became the property of the United States when delivered, inspected, and accepted by the proper officer at Fort Union.

(*b.*) Up to that time it was the private property of the outsiders, and wholly at their own risk.

5th. The loan is demonstrated, in this item, not to be to the outsiders at all, but to the Commissary Department; it

is "the act of one officer seeking to aid another in an exi-"gency;" "the corn was lent * * * merely to accom-"modate the Commissary Department, by helping it to exe-"cute a sudden and unexpected order for supplying corn at "Fort Union," &c. Is it not too clear for argument that this is the only proper and legal view of this "loan;" and that the principal continued all the time, so far as this plaintiff is concerned, to own the corn? And under this view, what becomes of the question of "EXIGENCY?"

We pray your Honors in this case, therefore, in view of the facts and of the principles of law governing them, to reverse the judgment of the lower court, and to give the claimant judgment for all the transportation still due on his contract with the Government.

Number of pounds to be transported under claimant's original contract with the Quartermaster's Department	15,000,000
Number of pounds actually transported by him under the said contract	14,202,811
Number of pounds remaining to be transported by him under his contract, and prevented by the United States	797,189
797,189 pounds at $2.05 per 100 pounds per 100 miles for 772 miles is	$126,163 09
Costs of transportation $10 per 100 pounds for 772 miles is	79,718 90
Amount now due by the United States to the plaintiff	$46,444 19

Respectfully submitted.

C. F. PECK,
DURANT & HORNOR,
of Counsel.

WASHINGTON, D. C., *November* 8, 1873.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

WILLIAM S. SHREWSBURY, APPELLANT,
vs.
THE UNITED STATES.
} No. 162.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

WILLIAM S. SHREWSBURY, APPELLANT,
vs.
THE UNITED STATES. } No. 162.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT.

The claimant and Colonel Potter, quartermaster in the United States Army, on the 27th of March, 1865, entered into a written agreement, whereby it was agreed that the claimant "shall receive at any time, in any of the months from May to September, inclusive, during the year one thousand eight hundred and sixty-five, from the officers of the Quartermaster's Department, at Forts Leavenworth and Riley, in the State of Kansas, and the town of Kansas, in the State of Missouri, all such military stores and supplies as may be turned over to him for transportation, in good order and condition, by the officer or agent of the Quartermaster's Department, at any or all of the above-named points or places, and transport the same * * * * to the officer or agent of the Quartermaster's Department on duty, or designated to receive them at Fort Union, in the Territory of New Mexico, or any other depot that may be designated in that Territory." (Rec., p. 2.)

It was further agreed by the 11th article of that contract, that the claimant "shall transport all the military stores and supplies for which the Quartermaster's Department may require transportation by contract, on the route specified by this agreement, during the year one thousand eight hundred and sixty-five; provided the weight of such military stores and supplies shall not exceed in the aggregate fifteen millions of pounds; yet nothing herein shall be so construed as to forbid or prevent the United States from using its own means of transportation for such service, whenever it may be deemed advisable to do so." (Rec., p. 5.)

Under this agreement, stores were furnished to the claimant by the Quartermaster's Department to the amount of over fourteen millions of pounds, for the transportation of which he was fully paid. The claimant was fully prepared with the means of transportation, and ready to transport the remainder of the fifteen millions of pounds, which, under the contract, he was bound to carry; but it was not furnished him for transportation.

On the 29th of September, 1865, Colonel Morgan, commissary of subsistence at Fort Leavenworth, entered into a contract with Fuller & Tiernan to deliver at Fort Union, eighteen thousand bushels of corn, on or before the 20th of December, 1865, which contract, is stated in full in the record, pp. 8, 9.

This contract was entered into by Colonel Morgan, with Fuller & Tiernan, in pursuance of an order received by the former from Colonel Haines, commissary of subsistence at Saint Louis, requiring Colonel Morgan to send to New Mexico, corn to the amount of about one million pounds. It being too late in the season for Colonel Morgan to advertise for proposals for said corn and to purchase it under advertisement in time to send it out by the Government freighter, and having an offer from Fuller & Tiernan, who were then furnishing grain to the Quartermaster's Department at Fort Leavenworth, to deliver the subsistence required at Fort Union, he made this contract. The corn was to be sent to the fort, not for the Army, but to feed Mexicans or Indians. Colonel Morgan hurried Fuller to get the corn

off, and Fuller borrowed from the quartermaster at Fort Leavenworth, some of the corn he was delivering to him, the said quartermaster lending the corn to Fuller & Tiernan to accomodate the Commissary's Department and to enable them to complete their contract sooner than they would have been able to do if they had to wait.

The quantity of corn so lent by the Quartermaster's Department was about one-half of the million pounds they contracted to transport, and the amount lent to them was afterward returned in kind to the Quartermaster's Department.

A part of the corn shipped by Fuller & Tiernan was stopped and taken possession of by the Government on the way, and the rest was delivered there according to the contract.

The Court of Claims dismissed the petition, and the claimant appealed.

ARGUMENT.

By the statute of 1818, chapter 61, sections 3 and 6, (3 U. S. Stat., 426, 427,) the Quartermaster's Department and the Commissary Department are separate and distinct divisions of the Army.

By the express terms of this agreement, the claimant only agreed to transport supplies, and military stores which he should receive "from the officers of the Quartermaster's Department, at Forts Leavenworth and Riley," and by the eleventh article of the agreement, Colonel Potter agreed with him that he should "transport all the military stores and supplies for which the Quartermaster's Department may require transportation by contract, on the route specified." There is nothing to show that the Quartermaster's Department had authority to make contracts binding a department of the Army separate and distinct from it.

But, independently of this, it must be presumed that the contract was limited intentionally to the supplies which one branch of the Army required; and it would be a violation of all established rules governing the construction of written instruments to hold that the contract,

directly contrary to its terms, was to include all the supplies which military officers might require to be transported. Such a construction might, perhaps, be allowable, if it were not possible to give effect to the contract without it. But it appears from the findings of the court below, that the Quartermaster's Department had furnished the claimant with stores for transportation amounting to more than fourteen millions of pounds; so that the Quartermaster's Department had substantially furnished all that they were bound to.

Such being the construction of the contract, we submit that the case is plain. The supplies that Fuller & Tiernan carried were supplies bought by Colonel Morgan of the Commissary Department deliverable at Fort Union.

But besides this, we contend that this was not a contract for transportation at all, but only a contract for the sale and delivery to Government officers at Fort Union of so much grain. And the fact that the Quartermaster's Department lent Fuller & Tiernan part of the supplies in order to help them in the exigency, cannot affect the legal character of the transaction, unless it was collusively done, which is not pretended, the corn having been returned in kind.

C. H. HILL,
Assistant Attorney-General.

O

18-870

Affirmed—

Judge Bradley

Dissenting decision correct

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~347~~ 758

PHILIP HICKS, APPELLANT,

vs.

GEORGE KELSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 16, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 347.

PHILIP HICKS, APPELLANT,

vs.

GEORGE KELSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Petition to supply lost records	1	1
Schedule A, bill of complaint	7	3
B, answer	19	6
C, replication	25	8
D, abstract of testimony	27	8
E, patent to Hicks	56	18
F, patent to Flood	61	19
G, decree of dismissal	71	22
H, appeal bond	72	22
Notice of application to supply record	74	23
Order supplying same	77	24
Stipulation extending time for return	78	24
Certificate to transcript	79	24

a Pleas in the circuit court of the United States for the northern district of Illinois, held at the city of Chicago, in the district aforesaid, in chancery, before the Hon. Henry W. Blodgett, district judge of the United States for said district, on the second day of August, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the ninety-sixth year.

WM. H. BRADLEY, *Clerk.*

PHILIP HICKS
vs.
GEORGE KELSEY. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the twenty-second day of November, in the year of our Lord one thousand eight hundred and seventy-one, came Philip Hicks, complainant, by Goodwin, Larned and Towle, his solicitors, and filed in the circuit court of the United States for said district, at Chicago, in said district, his petition for leave to supply lost records of said court in the cause wherein said Philip Hicks is complainant
b and George Kelsey is defendant; which said petition, together with the exhibits therein referred, is in the words and figures following, to wit:

1 *Petition to substitute lost records.*

Circuit court of the United States, northern district of Illinois.

PHILIP HICKS
vs.
GEORGE KELSEY. } In chancery.

To the judges of the circuit court of the United States in and for the northern district of Illinois:

The petition and application of Philip Hicks, complainant in the above-entitled cause, respectfully showeth:

That, in the first week in July, A. D. 1869, your petitioner filed his bill of complaint in this court against George Kelsey as defendant, for relief, touching the matters therein contained. That, thereupon, a subpœna ad respondendum was duly issued, returnable the first Monday of August, 1869, and delivered to the marshal of said district, and personally served upon said defendant, as your petitioner is informed
2 and verily believes; that the said defendant entered his appearance in said cause by Story & King, licensed practitioners of this court, as his solicitors; and, on or about the first Monday of November, A. D. 1869, the said defendant filed his answer to your petitioner's said bill of complaint, signed by Story & King, as his solicitors & counsel; that a general replication to said answer was duly filed by your petitioner; that said cause being at issue, full evidence was taken and filed both on the part of your petitioner and on the part of the said defendant, and the proofs closed and the cause duly set down for hearing, and heard and argued in due course by Messrs. Story & King, for the defendant, and by Mr. S. A. Goodwin, for your petitioner; and, on or about the second day of August, A. D. 1871, a decree was entered by said court in favor of the said defendant, and dismissing your petitioner's said bill with costs; that said cause was argued upon copies of the

pleadings & exhibits and models, and a full and complete abstract of all the testimony in the case hereafter referred to; that your petitioner appealed from the said decree, and, on the 10th day of August, A. D. 1871, (within ten days,) your petitioner filed the usual appeal-
3 bond, with William Collins as surety, conditioned to pay all the costs and damages adjudged by said decree if the same should be affirmed in the Supreme Court.

Your petitioner further shows to this court that it is a public and notorious fact that, in the great fire of the 8th and 9th of October, 1871, which destroyed a large portion of the city of Chicago, the entire dockets, files, and court-records of this court were lost, destroyed, and burned, (and, as your petitioner believes, and so states,) including the entire dockets, files, proceedings, and records in said cause, as well the originals thereof, as your petitioner's office-copy, in a bound manuscript volume, of the entire testimony in said cause, then recently left by your petitioner's counsel with the clerk of said court for use in his return on said appeal. That said loss and destruction occurred without the fault or neglect of your petitioner; that no certified copies of such files, proceedings, or records can be obtained by your petitioner, none having been made and no return to said appeal before the fire.

Your petitioner further states that he now produces to this court—

4 First. A true copy of the original bill filed in this cause, marked Schedule A.

Second. A true copy of the original answer filed in this cause, marked Schedule B.

Third. A true copy of the replication filed in this cause, marked Schedule C.

Fourth. A full, correct, and fair printed abstract of the whole testimony taken by both complainant and defendant in this cause, made by S. A. Goodwin, your petitioner's counsel aforesaid, personally, marked Schedule D.

Fifth. A correct copy of your petitioner's patent, Complainant's Exhibit A, in said testimony referred to, marked Schedule E.

Sixth. A correct copy of the patent of Ed. S. Flood, Defendant's Exhibit A, in said testimony referred to, marked Schedule F, and a copy of said decree, appeal, allowance, and bond, marked Schedules G and H.

And your petitioner states that the said Schedules A, B, C, D, E, F, G, and H, with the statements in this petition set forth, do actually contain and exhibit the substance of the said files, proceedings, and record in this cause, with the models therein referred to.

Your petitioner further states that the loss and destruction of the records as aforesaid in said cause will result in loss and damage to your petitioner unless supplied, and he therefore prays that the said
5 cause may be redocketed and reinstated in said court, and that said Schedules A, B, C, D, E, F, G, and H may be filed by said court and declared to be the substance of such lost and burned files and record, and be substituted and stand in lieu thereof, with this petition, for the purpose of a return to said appeal and all other purposes in said cause, as the supplied record, pursuant to the powers and authority of this court and according to the statute in such case made and provided.

PHILIP HICKS.

GOODWIN, LARNED & TOWLE,
Solicitors for Petitioner.

UNITED STATES OF AMERICA,
State of Illinois, Cook County, ss:

Stephen A. Goodwin, of Chicago, being sworn, says that he has read the foregoing petition; that he is one of the firm of Goodwin, Larned & Towle, solicitors for the within-named complainant, and as such has personally conducted all the proceedings in the within-named cause, and as such solicitor and agent is better acquainted with the details
6 of said cause than said complainant.

And this deponent further says that the facts stated in said petition are true, of deponent's own knowledge, except such facts as are therein stated on information and belief, and as to those facts he believes the same to be true.

S. A. GOODWIN.

Subscribed & sworn to this 20th day of November, A. D. 1871, before me.

W'M H. BRADLEY, *Clk.*

(Endorsed:) Filed Nov. 22d, 1871. W'm H. Bradley, cl'k.

7 SCHEDULE A.—*Bill of complaint.*

United States circuit court, northern district of Illinois.

To the honorable the judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

Philip Hicks, of the city of Chicago, in the State of Illinois, and a citizen of said State, brings this his bill of complaint against George Kelsey, of the city of Chicago, and a citizen of the State of Illinois, residing within the northern district of said State.

And thereupon your orator complains and says that, before the twenty-seventh day of October, eighteen hundred and sixty-eight, your orator was the true, original, and first inventor of a certain new and useful improved truck and wagon reach, not known or used by others before his said invention thereof, and which had not, at the time of his application for a patent therefor, been in public use or on sale
8 with his consent or allowance, for more than two years before his application for a patent therefor, as your orator verily believes.

And your orator further show' unto your honors that your orator, so being the inventor of said improvement, and being a citizen of the United States aforesaid, made application to the proper Department of the Government of the United States for letters-patent therefor, in accordance with the then existing laws of Congress; and he having duly complied in all respects with the conditions and requisitions of said laws, such proceedings were had, that, on the twenty-seventh day of October, eighteen hundred and sixty-eight, letters-patent of the United States for the said improvement and invention under the seal of the Patent-Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents, and bearing date the day and year last aforesaid, were issued in due form of law and delivered to your orator, whereby was granted and secured to your orator and his heirs, executors, administrators, or assigns for the
9 term of seventeen years from the day of the date thereof, the full and exclusive right of making, using, and vending to others to be used, the said improvement and invention, a description whereof is

given in the words of the said inventor, in a schedule in writing, accompanied by drawings and references thereto, duly annexed to said letters-patent, when the same were issued and made a part thereof, as by the said original letters-patent or a duly authenticated copy thereof in court to be produced will fully appear, a copy of which, without the drawings, is hereto annexed, forming part of this bill, and marked Schedule A.

And your orator further shows unto your honors that the said improvement and invention patented, as aforesaid, has hitherto been in the exclusive possession of your orator or his grantees, and has hitherto been and still is of great value and profit to your orator. And your orator has extensively made and used the said improvement, and but for the infringement hereinafter complained of, your orator would

10 now be in the undisturbed possession and enjoyment of the exclusive privileges secured by said letters patent to your orator and his assigns.

Yet the said defendant, as your orator is informed and believes, well knowing the premises, but contriving to injure your orator, and without his consent or allowance, and without right, and in violation of your orator's said rights, has, within said State of Illinois, and within said northern district of Illinois, used and is still using the said improved truck and wagon reach—but how many your orator cannot state, but prays that the defendant may discover and set forth the number—containing substantially the improvement and invention, or a material part thereof set forth and patented in and by said letters-patent, and thereby the said defendant has infringed, and still does infringe, and your orator fears that in future he will infringe, upon the exclusive rights and privileges secured to your orator as aforesaid.

11 To the end, therefore, that the said defendant may, if *they* can, show why your orator should not have the relief herein prayed, and may, but not on oath, the defendant's answer on oath being expressly waived, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make, to all and singular the premises, and that they may be decreed to account for and pay over to your orator all gains and profits realized by him from the unlawful making, using, or vending the improvement vested in your orator, as aforesaid, and may be perpetually restrained by an injunction to be issued out of this honorable court from making, using, or vending any truck or wagon reach containing the improvement and invention secured, as aforesaid, to your orator, or any material part thereof, and that your orator may have such other or further relief as equity may require, and to your honors may seem meet,

12 May it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna, directed to the defendant, George Kelsey, and commanding him, at a certain time and under a certain penalty, to appear before your honors in this court, then and there to answer unto this bill of complaint, and to abide by and perform such decree as the court shall make in the premises; and your orator will ever pray, etc.

PHILIP HICKS.

GOODWIN, LARNED AND TOWLE,
Solicitors and of Counsel for Complainant.

13 No. 83497.

The United States of America to all to whom these letters-patent shall come:

Whereas Philip Hicks, of Chicago, Illinois, has alleged that he has invented a new and useful improved truck and wagon reach, and has made oath that he is a citizen of the United States; that he verily believes he is the original and first inventor or discoverer of the said invention, and that the same hath not, to his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor: These are therefore to grant to the said Philip Hicks, his executors, administrators, or assigns, for the term of seventeen years from the twenty-seventh day of October, one thousand eight hundred and sixty-eight, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention, a description
14 whereof is given in the annexed schedule and made a part of these presents.

In testimony whereof I have caused these letters to be made patent and the seal of the Patent-Office to be hereunto affixed. Given under my hand at the city of Washington, this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

O. H. BROWNING,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.
[L. S.]

ELISHA FOOTE,
Commissioner of Patents.

15 UNITED STATES PATENT-OFFICE.

Philip Hicks, of Chicago, Illinois. Letters-patent. No. 83497. Dated October 27, 1868. Improved truck and wagon reach.

Schedule referred to in these letters-patent, and making part of the same.

To all whom it may concern:

Be it known that I, Philip Hicks, of the city of Chicago, in the county of Cook, and State of Illinois, have invented certain new and useful improvements in "truck and wagon reach," and I do hereby declare that the following is a full, clear and exact description thereof, reference being had to the accompanying drawings, making part of this specification and to the letters of reference marked thereon—like letters indicating like parts wherever they occur.

To enable others skilled in the art to construct and use my invention, I will proceed to describe it.

Figure 1 represents the side elevation, and Figure 2, the plan of
16 the reach. Figure 3, represents a solid metallic splice. My invention consists in making ordinary wooden reach of trucks and wagons of two separate parts, in connecting or splicing said parts with metallic plates or metallic casting so arranged as to allow the front-

wheels of such trucks or wagons at the sharp turns to freely pass under said plates or casting. A is the hind part, and B the front part of the wooden-reach, having their inner ends *a b* tapered. P P are metallic plates straight at the ends and curved about the middle, as represented on Fig. 1. They are bolted together at the curve O, forming there one mass of metal and separating *a*, and enclosing the tapered ends *a b* of the wooden parts of the reach, to which they are securely bolted. The plates extend back to the hind hounds D D, and in front to the front bolster E, thus forming, with wooden parts A B, one continuous reach.

The above described metallic splice instead of consisting of two separate continuous curved plates as P P, can be cast in one solid piece of metal K, as represented on Fig. 3, the ends *a b* of the wooden
17 parts A B being fitted to the casting. F is a rubbing-iron, consisting of a block strapped to and under the plates P P, by a metallic strap G, near to or at the point where plates P P or casting K connect with tapered end *b* of the wooden part B of the reach. The strap is bolted to the plates or casting, and the back part P of the block F is resting on and moving along the sway-bar H, used in heavy trucks and wagons.

The advantages of the above-described curved metallic splicing are, that not only a new curved reach can be easily made, but any old straight reach can readily and cheaply be converted into a curved one. I do not claim either wooden or metallic continuous curved reach, per se, as I am aware that such reaches have been and are used. But

What I do claim as my invention and desire to secure by letters-patent, is—

1. The reach made of two wooden parts A B, connected by a metallic curved splice consisting of separate plates P P, or of solid metallic
18 piece K, the whole arranged substantially as and in the manner herein set forth and specified.

2. The metallic block K constructed and secured to the curved part of the reach or splice, substantially as and for the purpose set forth.

PHILIP HICKS.

Witnesses:
J. B. TURCHIN.
JOHN J. HICKS.

19 SCHEDULE B.—*Answer.*

United States circuit court, northern district of Illinois.

PHILIP HICKS
vs.
GEORGE KELSEY. } In equity.

The answer of the said defendant to the bill of complaint so filed against him herein by the said complainant.

This defendant reserving all right and benefit of exception to the many errors in said bill contained, for answer thereto says: He denies that the said complainant was the original, true, and first inventor of the said truck and wagon reach in said bill mentioned; or that the same was unknown or used by others before said 27 October, 1868, or that the same had not been in public use and on sale for two years previous thereto, or that letters-patent were issued to complainant in manner and form as said complainant has in said bill alleged.
20 And defendant denies each and every allegation in said bill contained upon said subject. This defendant, further answering,

denies that said so-called improvement is or ever was any improvement, or is or ever was invented by the complainant, or is or was patentable or contemplated by the statutes of the United States on the subject of patents any more than a knife and fork, or the common old-fashioned door-latch.

He denies that complainant has ever been in the exclusive or any other possession of the same, or that he has ever manufactured or used the same in any manner, or that said improvement is of any value to complainant or any other person in the known world, as set forth in his said bill; and he denies each and every allegation of said bill on these subjects.

This defendant, further answering, denies that he ever used or is still using any of the truck or wagon reaches described or referred to in said bill of complaint, or that he has in any manner infringed or attempted to infringe upon the said pretended rights of complainant.

And, further answering, defendant says that he is using a certain truck or wagon reach, made for defendant by William Way-
21 man and William Wharton, wagon-makers of said city; but he denies that the same is in any manner similar to or substantially like the said pretended improvement mentioned in said bill, or that the same contains said pretended invention or any material part thereof. This defendant, further answering, says that his said wagon-reach, so in use by him as aforesaid, was made by and under the authority of one Edward F. Flood, under and in pursuance of certain letters-patent, duly issued by the proper authorities of the United States, on the 15th day of October, A. D. 1867, to said Flood for an improvement in truck and wagon reaches of which said Flood was the original, true, and first inventor, and according to the description and schedules in said letters-patent contained, which defendant avers was granted upon due application, and were in due form of law, as by reference to the same, which defendant is ready to produce, or certified copy thereof, as this court may direct, will more fully appear. And defendant further says that said invention secured to said Flood in no way infringes upon said pretended invention of said complainant, and is wholly unlike it.

22 And, further answering, defendant says that the said pretended invention of the said complainant, prior to the time mentioned in his said bill and said pretended letters-patent, substantially was invented and put into public use and used generally throughout the country, and such use was known to Charles Wright, of 145 South Canal st., Chicago; George W. Bohanon, of No. 60 West Madison st., Chicago; George Hannis, 97 East Kinzie st., Chicago; John Noll, 107 Fulton st., Chicago; Edward Hanlin, 121 East Washington st., Chicago; Eugene Ford and David Ford, late 104 West Lake st., now No. South Curtis st., Chicago; Henry John Whitehouse and William F. Whitehouse, No. West Washington st., Chicago; U. P. Harris, late chief engineer Chicago fire department, No. 60 Wells st., Chicago; Robert Williams, No. 103, Adams st., Chicago; Hunnenson and Company of Boston, Massachusetts, builders of engines; Lilsbe & Company, builders of fire-engines, Seneca Falls, New York; Millerland, No. West Lake st., Chicago; William Wayman and William Wharton, cor' Peoria and Lake st's, Chicago; each and all of whom possessed a prior knowl-
23 edge of such invention claimed to have been made by said complainant.

And defendant, further answering, says that before any invention or use of said pretended invention by said complainant, the said invention and thing patented were used in the city of Chicago by the fire de-

partment thereof upon old hand engines, and also by teamsters, wagon and truck makers upon all sorts of four-wheeled vehicles in and about the country, publicly and notoriously.

And defendant further says that said pretended letters-patent of said complainant, if any he has, was procured by means of fraud on the part of complainant; that there is no novelty in the said pretended invention, but an utter want thereof, and said letters-patent were and are void for these reasons.

And, further answering, defendant says the complainant has not, in and by his said bill, made or stated such a case as does or ought to entitle him to the relief and discovery sought, or to any discovery or relief from the said defendant or of this court; that it nowhere appears from said bill that complainant has ever established his said pre-
24 tended letters-patent at law, and his said bill of complaint is in other respects informal and insufficient. Wherefore this defendant asks that said bill be dismissed, and that he have his reasonable costs adjudged to him, in this behalf most wrongfully sustained.

GEORGE KELSEY.

STORY AND KING,
Sol'rs for Def't and of Counsel.

25 SCHEDULE C.—*Replication.*

United States circuit court, northern district of Illinois.

PHILIP HICKS
vs.
GEORGE KELSEY. } In chancery.

The replication of Philip Hicks, complainant to the answer of George Kelsey, defendant.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the mainfold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the
26 said answer contained, material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GOODWIN, LARNED & TOWLE,
Complainant's Solicitors.

27 SCHEDULE "D."—*Abstract of testimony.*

PHILIP HICKS
vs.
GEORGE KELSEY.

Abstract of testimony for complainant. Prima facie.

JOHN G. HICKS, agent & son of complainant:

(Philip Hicks' patent put in, dated October 27, 1868, marked Exhibit A.)

Witness is familiar with Ex. A. Complainant has built the truck patented every month since the patent was granted; is an experienced mechanic in wagons. An ordinary mechanic could build the reach described from the specifications. Complainant's Model No. 1 is a correct representation of the reach patented. Knows Kelsey, the defendant. He is a teamster. He uses a truck with a crooked reach. It is constructed as shown in Complainants Model No. 2 in all respects. As to the connections and the plates, I can't tell whether in Kelsey's reach there is any strip or thing between the plates. The defendant has
28 used this truck in Chicago since middle of July, 1869, two weeks before the commencement of this suit.

Cross-examination:

Complainant don't claim a crooked reach, but an improvement—one of two iron-plates or of solid iron. Saw defendant use this truck nearly every day for the two weeks before suit was brought; like Model No. 2, as far as I could see; can't swear no wooden part between the plates.

Re-direct:

Examined Kelsey's wagon & reach twice with John Hards, once near Kelsey's barn, and again front of West Lake St. Kelsey was driving. Mr. Hards took the dimensions. It was the only wagon in town with a reach with top and end plates over the curve. It had Kelsey's name on it, and I had seen him driving it.

JOHN HARDS:

Is a wagon-maker; went with John G. Hicks, and examined
29 wagon & truck with Kelsey's name on it, as Hicks has sworn to twice. On that examination made Complainant's Model No. 2. It represents it correctly as we examined it.

EDWARD A. ELLSWORTH:

Is a patent expert; has examined complainant's patent, Exhibit A The Model No. 1 is a correct model substantially of the invention; says Complainant's Model No. 2 (Kelsey truck) exhibits substantially the invention of Philip Hicks. The invention consists in the production of a metal'ic curved splice, either in one or two pieces, by which the forward and rear parts of a wagon reach are connected together; the primary object being to allow the front wheels or trucks of wagons on sharp turns to pass freely under the reach. The use of a curved reach entire is not new, neither is a metallic reach, in itself considered. Hicks' invention is spe'ially applicable in converting old strait reaches into curved ones, in cheapening the production of curved reaches, and facilitating their re-
30 pair. I find in Model No. 2 two plates, connecting the forward and rear portion of the reach together, made of two wooden parts. The thin strip of wood interposed between the two ends of the reach, forward and rear, is held in place by curved plates, and serves no special purpose in strengthening the reach. If the plates were removed the reach would not resist the strain. I am of opinion that Hicks' invention is substantially found in Complainants Model No. 2.

Defendants testimony in answer.

WILLIAM WYMAN:

Knows defendant; had a crooked-reach truck in July, 1869. It was built at our (Wyman and Wharton's) shop, in Chicago, in spring or commencement of summer, 1869; built of wood, with iron straps on

top, bottom, and both sides, substantially like this drawing, Exhibit A, (copy of Floods patent drawing,) saw crooked reaches in England thirty-
five years ago, made of wood and iron, and so wheel could pass
31 under; afterwards saw trucks in Chicago, made precisely like the drawing, only larger, in 1866 and 1867. They were used by Jones & Laughlin and others.

I saw a truck with curved reach made entirely of iron, in Chicago, along in the fall of 1868, say about the first of September, in the shop of Edward F. Flood; afterward saw it used in the streets; saw only one made of two pieces of wood and crook of solid iron, with sockets at each end into which the wood parts were secured with bolts. The reach we made for Kelsey was in three pieces—one came to the sway-bar of the front hounds—next the crooked piece 2½ or 3 f't. The other from this through the axle. We were licensed under Flood's patent. Defendant put in patent to Flood, dated October 15, 1867.

EDWARD F. FLOOD:

Saw Kelsey's truck in spring of 1869, at Wyman & Wharton's shop. It was made of wood and iron, and, near as I can judge, like Ex.
32 A, except the iron-plates were heavier. Ex. A is duplicate of my patent-drawing. My reach is made as in the patent described. Wyman & Wharton were my licensees. There were six built like my patent prior to October 1868.

There was a truck-reach with the crook entirely of iron, made at our shop in September, 1868. We afterward sold it to Richard Manly. It had wooden ends fitted into iron sockets and bolted. It has been in public use since we sold it. Exhibit B (on card annexed) shows my reach and the one made for Kelsey.

WILLIAM WHARTON:

Is a wagon-maker; worked for Hicks until June, 1868. Hicks made several crooked-reach trucks before I left; four or five; wood all the way through, with four iron-plates. These curved reaches were made up to two months before I left. Hicks said then he thought he could
improve on those reaches, referring to Flood's. Up to that time
33 Hicks' reaches were then made of wood, all one piece, with four plates, like Flood's patent, except the timber was bent instead of being sawed off. Hicks' reach is made (under his patent) the same as Flood's, except there is no wood in the center. Flood's was a wooden reach, the center—the crook—sawed out of plank, with two plates, one on each side and one on top & bottom. The wood run clear through and was connected at each end; a continuation of the wood from one end of the reach to the other.

Think the reach better with wood between the plates. You can tighten it up & stiffen it better. The bolts will not cut each other, where there is wood, so easy as with two plates together.

Kelsey's reach was made in our shop about two years ago; know Hicks' patent reach; Kelsey's was made with four plates and wood in the center. I saw Complainants Model No. 4 lying on the floor. I didn't examine it only the wood didn't run clear through on that one. I noticed a space
in between. Kelsey's was a continuation of wood clear through, in
34 three pieces. The plates were an inch thick by three wide. It was made after Flood's patent. We bought the right and made our reaches after the same pattern. The reach may be a little heavier, but the principle is exactly the same; holds same as before as to ad-

vantage of wood between plates; will bear vibration better; iron will break in frosty weather. Have seen Kelsey's reach within a week; saw it when being made.

CHARLES HAYDEN:

Wagon-maker; worked for Mr. Wharton two years ago; made the wood-work on the Kelsey reach. The wood-work was in three pieces and a curved reach. The size of it was four inches back of the curve, in the curve thinner, and front of it four inches. There were two plates on the sides and one on the top and bottom. It wouldn't hold without the iron-plates. The wood was joined together front and back of the curve, not fastened or pinned together, but they fitted together tight joined. Have seen some of Flood's reaches. I believe they were the same as this of Kelsey's—not exactly, but so much as I can see.

35 WILLIAM WHARTON, recalled:

The Flood reach is 3x4, a continuation of wood, and smaller at one end than the other; the iron is 3 inches to 3½ on top and bottom, and on each side 2½ inches.

Rebuttal.

RICHARD MANLY:

Knows Edward F. Flood: in April, 1869, bought a wagon of him with a truck having a crooked reach of solid iron. It was similar to Hicks' Model No. 1. It was made of iron.

RICHARD RICHES:

Worked in Flood's shop in 1868 & '9; made wagon-trucks. I made the wood-work of the truck sold by Flood to Richard Manly. It was made in fall of 1868. The crooked iron-reach was forged out a month before Christmas, and finished after Christmas. The truck was completed then and painted afterwards, and taken away by Mr. Manly, (the last witness,) in the spring of 1869. The reach was made of solid iron. Flood directed the making. He said he expected trouble with Hicks. He had heard Hicks had got his papers—a patent. There was no other crooked iron reach, either solid or two plates, made there that fall and winter.

36 PETER PETERSON:

Worked for Ed. Flood from the fall of 1868, the 1st of September, until August, 1870, in the wagon-shop, as a blacksmith; knew the wagon-truck made in that shop and sold to Richard Manly. The reach was made of solid iron and connected with the wooden pieces front & rear. The iron crook was commenced and done in November. It was finished some time i January, 1869, and begun in October before. It was made under Flood's instructions. He said we should make it a little different from Hicks'. The truck was finished latter part of winter, or early in spring, and sold to Mr. Manly, the witness above. The reach was made of iron.

Cross-examination:

The other crooked reaches made in the shop were made out of four pieces of iron, and wood in the center. The Manly reach was solid iron joined with wood at each end front and rear; no other solid, or of two plates made there that fall or winter.

37 JOHN HANAHAN:

Worked in Flood's shop from September, 1867, to summer of 1869; saw the reach of the truck sold to Manly, made. The iron work was commenced before Christmas, and finished some time after. Peterson did the wood-work under Flood's instructions. He said he expected to have trouble about it with Mr. Hicks. Manly purchased the truck in the spring of 1869. I saw him take it away. It was solid and not two plates, and connected front and rear by a forked jaw. There was no other iron reach, either solid or of two plates, made at Flood's shop in the summer, fall, and winter of 1868–9.

JOHN G. HICKS, JR:

Son of complainant; knows Kelsey, the defendant; was in his father's employ in the spring and summer of 1868, at 134 West Lake s't, wagon-making; have wood-work shop and iron-work shop; is familiar with crooked reaches, wagon-making business, and with complainant's pat-
ent, Exhibit A. On the 14th of August, 1861, Mr. Hicks described
38 the reach he had invented as an improvement. He drew a chalk diagram of it on an iron-table in the shop, of such a reach, with the crook and the front and rear connections, and bent an iron rod or bar $\frac{5}{16}$th round in the shape of the reach, to show how it should be made, solid or in plates. This was in presence of witness and Swanson, the blacksmith. Hicks gave directions how to construct a truck after that plan to Swanson, the blacksmith, and Richard Phalon, the wood-worker. The reach was completed in about a week after, and the truck also. The description father gave and the wagon truck and reach so completed were in all respects like Complainant's Model No. 1, with the reach of two iron-plates, and the wooden connections as in that model. The painting of this truck was completed September 9th, 1868, and the truck sold and delivered to William Johnson. It was used in Chicago from September 9, 1868, to May 1, 1870, when it was taken to Bloomington,
Ill., where it is now in use. Another just like it was made
39 immediately after for Berry Bro's, Detroit, and delivered in October, 1868; have had them constantly on hand ever since. Complainant's Model No. 3, is a full-sized reach like Hicks' patent; knows the reach used by Kelsey, defendant; examined it particularly, with several others, on the night of November 21st, 1870. We found it in an alley near Prescott & Williams' iron-store, standing with a load of hickory axletrees on it; a small boy was with me and helped unload it. It was same wagon of George Kelsey's, with the reach refer'ed to in the testimony heretofore taken in this suit. It had the same lettering, the same painting, the same reach, the same construction, and was marked with George Kelsey's name and his number and license, and I have since seen his man whom I know to be such, using the same wagon. I unloaded the wagon, hitched a pair of horses to it, took it to our shop
and, with the wagon-makers and blacksmiths, took it to pieces,
40 took out the reach and took it apart and examined it. John Anderson, Henry Swanson, Martin Maginis, and father were present with me, and examined the reach. Compt's Model No. 4, is a full-sized representation of Kelsey's truck, as we found it. John Anderson made the wood-work, and Martin Maginis the iron-work of model No. 4. That model shows the Kelsey truck in the size and shape and construction of the reach in the measurement, thickness, and width of plates in the front and rear connections, in the thickness and width of the wooden strip between the plates and the entire disconnection of the wooden strip with the wooden part of the reach in the rear. There the wooden

strip is bevelled and a space of three inches is left between such rear end and the rear wooden connection. On the front end the wooden strip comes butt up to the wooden continuation but is separated and not connected as in Kelsey's truck and reach. The side plates were respectively $\frac{7}{8}$ and one inch in thickness, and three inches wide. The
41 wooden strip between the plates was $1\frac{1}{4}$ inchs ethick by three inches wide on the rear end, and on the front end $\frac{5}{8}$ inch by $\frac{1}{16}$, and the width same as side plates. It was of the same size, thickness, and width as shown in the Model No. 4. That strip was ash and cut across the grain.

Cross-examination:

There is no danger of an iron reach like Hicks' breaking on rough roads. The strip of wood in Kelsey's reach would not prevent the vibration of the iron-plates.

Re-direct:

That strip serves no useful purpose. I see no purpose for it except trying to avoid infringement. I regard it an injury.

Re-cross:

The wood there diminishes the strength of the iron plates. If the wood was not there the plates would bolt close together stronger than with a space between them, and a leverage with rivets.

42 HENRY A. SWANSON.

In 1868 I worked for Mr. Hicks. In the beginning of August, 1868, Hicks brought me a bent iron to show me what kind of a reach he wanted made, and directed it made similar to Complainant's Model No. 1. He marked out the theory with chalk on the face of the iron-plate. I made one as directed soon after—the iron part within a week—with two plates. There was a truck complete made. It was sold to Mr. Johnson.

Cross-examination:

The reach was finished in August. I am certain about that.

RICHARD PHALEN:

Wagon-maker; worked for Mr. Hicks in summer of 1868. Mr. Hicks came to me and said he was going to make a crooked reach, and told me, and showed me how to make the wood-work, and where to cut it off for an iron curved reach. I saw the iron after it was done. It was in August. The truck was completed some time in September, and sold to Mr. Johnson.

43 Cross-examination:

Had seen Flood's reaches before. He made one in Hicks' shop—in Crane's shop. It had four plates on, and appeared like Complainant's Model No. 4, at that distance. I staid outside, on the sidewalk, and looked at it.

Re-direct:

The heavy plates of that reach were on the top. I have examined Complainant's Model No. 4 to day. In my opinion, as a wagon-maker, the strip of wood shown in that reach between the plates as constructed, can serve no useful purpose at all. Hicks has made about thirty-five

or forty of his reaches at his shop since 1868. Never knew one brought back broken.

Re-cross:

The plates are stronger, bolted closer together; can't get them snugger or tighter with the strip of wood in as in No. 4. Iron can be fitted just as snug as wood. Work for Hicks.

JOHN ANDERSON:

Wagon-maker; know Mr. Ed. Flood; worked for him from May
44 3, 1867, till fall of 1869; know of the truck made in Flood's shop, and sold to Richard Manly; made with a curved iron-reach. It was commenced in the fall of 1868, about November, and up to Christmas.

Riches did the wood-work and Peterson the iron-work. The iron curve was begun in November. It was solid iron. The whole truck was put together, and in the paint shop in the first part of January, 1869. It was sold in the spring to Richard Manly.

In November, 1870, worked for Mr. Hicks; was present when Kelsey's truck was brought into the shop in the evening; helped take it to pieces, and examined the construction of the reach. John Hicks, Swanson and Martin were present. I did the wood-work and Martin the iron-work of Complainant's Model No. 4. The model is exactly like Kelsey's truck in size and proportion, and all its parts.

Cross-examination:

The reach was brought there in the night a secret. We took the plate off top and bottom, cutting the rivets off as far as the front
45 end, and sprung the under plate back, so as to see the curve. Kelsey was not there; was in bed; it was half-past 10 o'clock. This reach (No. 4) is just like Kelsey's. Flood never put his plate on the side as wide as the wood. His reach had iron-plates on the sides, and wood in between, but not a bit like Model No. 4.; not made in the same way, nor connected in the same way. In Model No. 4 the wood is just put in, and there is no support or strength whatever to it. Flood's reach was all the same size of wood from hind to front axle.

The wood between the plates in No. 4 is no advantage; can't get the bolts snugger with it. The bolts would work loose in the wood; can't adjust the iron-plates better, nor so well, with this wood interposed between them.

Re-direct:

The plates on Flood's reach were strongest top and bottom, to give strength to the crook. In the Model No. 4 the strip of wood is entirely disconnected from the other parts of the reach. The reach borrows no
46 strength or assistance from the thin strip of wood. There is no connection. In Flood's the reach is entire from the hounds to the rear and is a wooden reach with supporting plates thin, compared with the wood. It is different from No. 4. In Hicks' reach the two plates are bolted together, so as to make them comparatively solid; substantially solid.

MARTIN MAGINIS:

Blacksmith; works for Hicks. On 21st November, 1870, saw and helped take to peices and examine Kelsey's wagon-reach, brought to the shop by John Hicks. We took it apart—two plates of it—so we

could see what was between the plates and measure. I made Complainant's Model No. 4, to show the Kelsey reach. It is exactly the same thing in thickness of plates, size, and dimensions; and in all respects the whole thing is the same. There was an open space in the strip of wood, a gap between the rear of the reach and the strip of wood, three inches long right through, so that, thrusting through from below, you can strike the top plate. The model shows it all as we found it. Has worked at wagon-building, (blacksmith's work,) making wagons,
47 and these iron-reaches, for a year and a half. Have had to repair Flood's reaches. The strip of wood in Model No. 4 is of no use, and, worse, it is disconnected.

I made Complainant's Model No. 3, Hicks—reach. The side-plates in it and Model No. 4 are just the same—the same strength. They are bolted together the same, with the exception of a strip of wood interposed in the Kelsey. The construction of the plates, and the fastening them together, is the same. That strip of wood would change in wet and dry weather, by shrinkage, and loosen the bolts.

Cross-examination:

The strip of wood in No. 4 (Kelsey's) was cut cross-grained. Kelsey's reach was not at all like Flood's reaches, as I have seen them. I never read his patent. John Hicks brought Kelsey's wagon to the shop between 11 and 12 o'clock at night. He told how he got it—found it in an alley, hitched his horses on it, and brought it to the shop, and we examined it. Wood in between the plates, like No. 4, would not enable you to bring the plates together snugger. I made
48 Models Nos. 3 and 4; am a blacksmith; do the work on wagons; have worked at it ten years. I can bring two iron-plates as snug together and tight as with wood between them.

PHILIP HICKS:

Is complainant and patentee. I invented the iron-reach described in my patent. Conceived the idea in spring of 1868. In the summer of 1868 I embodied my invention. Commenced in July on wood-work, and in August the smith-work—about the middle. Showed the whole plan to Henry Swanson. I bent a rod with the turn and depth for the wheel, and chalked out the shape, depth, &c., and the ends how it was to be on the cast-iron plate used in the shop to make a fifth wheel on. From this description he constructed a reach as I wanted it. It was finished about the 18th or 19th of August, 1868. It was along the 13th or 14th when I described it to Swanson. About the 25th we got it in the paint-shop; work was then done. It was sold and delivered to Mr. Johnson Sept. 9, 1868, and from that time used by him. I
49 have made and put in use about forty-five reaches since, under my patent. I was present the night of 21st Nov., 1870, when Kelsey's wagon was brought in and examined. His name was on it, and it was marked, "Flood's patent, 1868." I saw it taken to pieces, and saw the hind part disconnected (of wooden strips) three inches, and on top it might be one inch from touching; in front part wood just rested together. Model No. 4 is as like it as two eggs, in all respects—size, proportion, thickness, and construction. Model No. 3 is a correct representation of my invention in size and everything else. Both Nos. 3 and 4 are life-size. Models Nos. 3 and 4 are identically the same except the thin strip of wood, and that is an injury instead of a benefit. Wood shrinks and swells in dry and wet, and shrinking would loosen the bolts. Disconnected as the wooden strip is, it adds no strength to the reach.

Cross-examination:

Knew Flood, and seen his reach before I made mine. Think wood an injury between the plates, as stated, as iron expands and con-
50 tracts, with heat and cold, lengthwise, and wood shrinks and swells, sidewise, with dry and wet. I use wood front and rear, for lightness and a better bearing. I don't claim the invention of a crooked reach, but my improvement. Complainant here puts in Hicks' petition for his patent, verified August 28, 1868, and file-wrapper showing petition and model received in Patent-Office Sept. 2, 1868, duly certified, marked Complainant's Exhibit B; also, copy specifications then filed, marked Complainant's Exhibit C.

CARYL YOUNG:

Occupation, teaming, &c.; three years have used crooked-reach trucks of Hicks' make, the curve of two metallic plates like Complainant's Model No. 3. Also know Flood's. My experience is that the wood between the plates in summer contracts and loosens the bolts. The Flood reach I speak of required $100.00 for repairs. It was Hicks'. It has been repaired by Flood twice, and by Martin once, and Hicks once. The reach was out of order. I think the strip of wood,
51 like that in Model No. 4, a detriment instead of a benefit.

Cross-examination:

I don't drive myself; have men to drive; have seen the wood contract in tires; not in Floods' reaches specially in person only that the part that gives away in them as the parties who have them say, and I know it from them. I think Hicks' reach is stronger than Flood's.

JAMES HORIGAN:

Teamster seven years; has used Hick's iron-reach, and also a wooden one strapped with iron. The iron-reach is the best. When you get on a load with the wooden one, in a sidling place, as you turn around the wheel will strike the reach and catch, and the wood springs and gives away; and the bolt in the wooden one would get loose from shrinking of the wood. I have had to tighten them up many times.

Cross-examination:

The wooden reach I used was made by Hicks. It was not like Complainant's Model, No. 4. The straps were not so heavy on the sides, and the wood was larger. It didn't stand. The wood cracked;
52 the wood was connected all the way through. I could see it. The plates didn't cover it; never used one of Flood's reaches.

JOHN H. BULL:

Is machinist and engineer; practiced thirty years; have noticed the iron-reach of Hicks' made like Model No. 3; also the wooden reach with plates one-third iron on the sides and two-thirds wood; found the bottom plates broken in the wooden one. I looked at it. In locomotives, formerly we used wood between our plates for frames. I know we had off-setts similar to that, and bolted through with two plates to the side; and the bolts holding these fast would continually work, the wood shrinking, and that would keep those bolts loose all the time, and the consequence was strain of the locomotive and the constantly breaking them. We had to abandon them and put two plates together, and the friction made one surface of it as long as those bolts were tight. In

the wooden reach I saw the bolts were loose from the shrinkage of the wood.

53 The advantage of Hicks' iron reach, Model No. 3, is that, being iron, the two plates come together as one whole, substantially soldered. In the other (the wooden one) the moment the shrinkage becomes such that the bolts become loose each has to take its own part, and the transit of the trucks moving from right to left, turning the friction from that, takes each separate strain from one and throws it on to the other so it makes only the thickness of the one side—the one piece of iron, where otherwise it would be two plates together. The crooked part right at the crook would break according to that arrangement, because the other part is stronger. It will break, whenever it gets so it will vibrate, at the weakest point. Comparing Models No. 3 and 4, I don't see any benefit in the strip of wood between the plates in No. 4—only a trouble to keep it tightened up.

Cross-examination:

54 I think No. 3 is stronger than No. 4. If No. 3 was built with a piece of wood running the entire length, well bolted, it would not stand more pressure and other strain than without the wood. The wood is continually elastic. It gives and shrinks, and the strain allows the two plates to work. It doesn't give an even strain to those two plates as if it were solid—wood will keep shrinking. You can't get a more complete opposition of two surfaces of wood and iron than of iron to iron; there is a friction connected with that that makes two pieces of iron as strong as they are if welded. The wood in the two ends of No. 3 might shrink some; not better all of iron, unless you wanted to carry extra weight. With a piece of wood through No. 3, well bolted together, the iron of the same strength, with a load on the street, I think it would not stand as much vibration.

CARLOS E. WRIGHT:

Is foreman of the stable and driver. In Complainant's Model No. 3 the expansion is in length. In No. 4 there is no expansion in
55 length. In the wood there is shrinkage in the thickness and the iron becomes loose, the bolts commence to work, and it is bound to break down at the lowest bolt at the forward or upward end of the curve. I have seen two of these reaches break already. It was Hicks' made after Flood's patent, and another I saw at Flood's shop.

WILLARD H. MILLER:

Is a truck-driver; has used a crooked reach on a light spring-wagon. It was wood center; lined on four sides; plates 1½ inch wide; built by a man under Flood's patent. I drove it since February, 1870. Being a spring-wagon it settled down, when loaded, on to the bend and broke it. I had it repaired.

Cross-examination:

Don't think a straight reach stronger than a crooked reach like model No. 3.

56 SCHEDULE "E."—*Patent to Hicks.*

No. 83497.

The United States of America to all to whom these letters-patent shall come:

Whereas Philip Hicks, of Chicago, Illinois, has alleged that he has invented a new and useful improved truck and wagon reach, and has made oath that he is a citizen of the United States; that he verily believes he is the original and first inventor or discoverer of the said invention, and that the same hath not, to his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty-five dollars and presented a petition to the Commissioner of Patents, praying that a patent may be issued therefor: These are, therefore, to grant to the said Philip Hicks, his executors, administrators, or assigns, for the term of seventeen years from the twenty-seventh day of October, one thousand eight hundred and
57 sixty-eight, the full and exclusive right and liberty of making, using, and vending to others to be used, the said invention, a description whereof is given in the annexed schedule and made a part of these presents.

In testimony whereof I have caused these letters to be made patent and the seal of the Patent Office to be hereunto affixed.

Given under my hand at the city of Washington, this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

O. H. BROWNING,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent-Office.
[L. S.]
ELISHA FOOTE,
Commissioner of Patents.

58 UNITED STATES PATENT-OFFICE.

Philip Hicks, of Chicago, Illinois. Letters-patent. No. 83487. Dated October 27, 1868. Improved truck and wagon reach.

The schedule referred to in these letters-patent and making part of the same.

To all whom it may concern:

Be it known that I, Philip Hicks, of the city of Chicago, in the county of Cook and State of Illinois, have invented certain new and useful improvements in truck and wagon reach, and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, making part of this specification, and to the letters of reference marked thereon—like letters indicating like parts wherever they occur.

To enable others skilled in the art to construct and use my invention, I will proceed to describe it.

Figure 1 represents the side elevation, and

Figure 2 the plan of the reach.

Figure 3 represents a solid metallic splice.

My invention consists in making ordinary wooden reach of trucks
59 and wagons of two separate parts, in connecting or splicing said parts with metallic plates or metallic casting so arranged as to allow the front wheels of such truck' or wagons, at the sharp turns to freely

pass under said plates or casting. A is the hind part, and B the front part of the wooden reach, having their inner ends *a b* tapered. P P are metallic plates, straight at the ends and curved about the middle, as represented on Fig. 1. They are bolted together at the curve C, forming there one mass of metal and separating *a*, and enclosing the tapered ends *a b* of the wooden parts of the reach, to which they are securely bolted. The plates extend back to the hind bounds D D, and in front to the front bolster E, thus forming, with wooden parts A B, one continuous reach. The above-described metallic splice, instead of consisting of two separate continuous curved plates, as P P, can be cast in one solid piece of metal K, as represented on Fig. 3, the ends *a b* of the wooden parts A B being fitted to the casting. F is a rubbing-iron, consisting of a block strapped to and under the plates P P by a metallic strap, G, near to or at the point where plates P P or casting K connect with tapered end 6 of the wooden part B of the reach. The strap is bolted to the plates or casting, and the back part P of the block F
60 is resting on and moving along the sway-bar H, used in heavy trucks and wagons.

The advantages of the above-described curved metallic splicing are, that not only a new curved reach can be easily made, but an old straight reach can readily and cheaply be converted into a curved one.

I do not claim either wooden or metallic continuous curved reach per se, as I am aware that such reaches have been and are used; but what I claim as my invention, and desire to secure by letters-patent is—1. The reach made of two wooden parts, A B, connected by a metallic curved splice, consisting of separate plates P P, or of solid metallic piece K, the whole arranged substantially as and in the manner herein set forth, and specified. 2. The metallic block K, constructed and secured to the curved part of the reach or splice, substantially as and for the purpose set forth.

PHILIP HICKS.

Witnesses:
J. B. TURCHIN.
JOHN J. HICKS.

61 SCHEDULE "F."—*Patent to Flood.*

The U. S. Patent-Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters-patent granted Edward F. Flood, dated Oct. 15th, 1857, No. 69789, "imp't in wagon-reach."

In testimony whereof I, Sam'l A. Duncan, Acting Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed, this second day of February, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the Uni ed States the ninety-fifth.

[SEAL.]

SAM'L A. DUNCAN,
Acting Commissioner.

62 No. 69789.

The United States of America to all to whom these letters-patent shall come:

Whereas Edward F. Flood, of Chicago, Illinois, has alleged that he has invented a new and useful improvement in wagon-reach, which he

states has not been known or used before such invention; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty-five dollars, and presented a petition to the Commissioner of Patents praying that a patent may be issued therefor:

These are therefore to grant, according to law, to the said Edward F. Flood, his heirs, administrators, or assigns, for the term of seventeen years, from the fifteenth day of October, one thousand eight hundred and sixty-seven, the full and exclusive right and liberty of making,
63 constructing, using, and vending to others to be used the said improvement, a description whereof is given in the schedule hereunto annexed and made a part of these presents.

In testimony whereof I have caused these letters to be made patent and the seal of the Patent-Office to be hereunto affixed.

Given under my hand, at the city of Washington, this fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-seven, and of the Independence of the United States of America the ninety-second.

W. T. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent-Office.
[L. S.]
A. M. STOUT,
Acting Commissioner of Patents.

64 UNITED STATES PATENT-OFFICE.

Edward F. Flood, of Chicago, Illinois. Letters-patent. No. 69789. Dated October 15, 1867. Improvement in wagon-reach.

The schedule referred to in letters-patent and making a part of the same.

To all whom it may concern:

Be it known that I, Edward F. Flood, of Chicago, Cook County, Illinois, have invented a certain new and useful improved wagon-reach, and I do declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings making a part of the specification, in which—

Figure 1 is a side-view or elevation;

Figure 2, a top or plan view;

Like letters refer to like parts.

The object of my invention is to so construct a wagon-reach that the vehicle with which it is used can be turned in the least possible space, and so that the wheel can never strike against the reach. I ac-
65 complish this object by making my reach of peculiar form, giving it a sharp turn or curve upward at the point where the wheel would strike the ordinary reach, which is always straight.

To enable others skilled in the art to make and use my invention I describe its construction and operation:

My reach is made of wood and iron, the form being shown in the drawings. The wooden part may be cut from a plank of sufficient width and thickness, though I usually take a piece of timber of such dimensions

as I would use if making the reach straight, as is usual, and then halve on to this straight reach or piece of timber, at the point *a b*, a piece of timber having its upper part curved, as the finished reach is to be, and as shown in the drawings. This piece of timber which is halved on, must be of such width that the lower side may be cut away so as to permit the wheel to pass under it, and this piece may be fastened to the straight piece in any suitable manner, but the fastenings must not interfere with the ironing of the reach: and the bolts used to fasten the irons to the reach can be so placed as to secure the two wooden parts of the reach together.

66 On to each side of my curved reach I place a bar of iron half an inch thick and an inch and a half wide. These irons are made to fit the curve of the reach, and are bolted firmly to the reach. These side irons do not extend to the rear end of the reach, but at *c* are bent outward and downward, and so made and fitted as to allow them to be fastened to the clips at the shoulders of the axles. When the reach has been properly cut away on the under side, at the proper point, so as to allow the wheel, when in use, to pass freely under it, I attach to the reach two other pieces or bars of iron, one on the under side, one on the upper, both being made and formed so as to fit the reach as curved. These pieces or bars of iron are bolted firmly to the reach. The upper iron at each end is bent upward a short distance from the end of the reach, and bolted to the bolsters, while the under iron is near the rear end, bent downward and fastened to the rear axle. These irons, on the sides and top and bottom of the reach, give it great strength, and

67 their attachment to the bolsters and axle as described, thoroughly brace the several parts. It will be observed that the ends of the reach occupy the same position as in a straight reach; so that, while I have the advantage of a curved reach, I do not change the line of draught, and do not bring any additional strain upon any part. The top of the reach comes up nearly to a line drawn from the top of one bolster to the other, and does not in any way interfere with the bed or box of the vehicle. I use the ordinary fifth wheel *d*, and also what may be called a sixth wheel, *e*, which is a continuation of the ironing of the sway-bar, which is attached to the hounds on which the reach rests and moves when the forward wheels are being turned. It is necessary to extend this ironing of the sway-bar farther forward than is usual, in order that when one of the forward wheels is turned under the reach, the reach will still have a point of support. This iron, which I call the

67 sixth wheel, is fastened to the sway-bar in the usual manner, and to the hounds in front, and the evener-bolt passes through it.

This reach is exceedingly useful for heavy truck-wagons, and the dimensions given are with reference to such wagons. It can be used to advantage on express wagons and other vehicles, and in size must be adapted to the vehicle for which it is made.

The advantage which this reach has over any other in use are numerous. Among others may be mentioned—

First. The wagon can be turned in less space. It can be, in fact, turned in the length of the wagon, one of the hind wheels remaining in a fixed point.

Second. The wagon can be driven by the side of the platform or other place where it is desired to bring the rear end of the wagon, and then the rear end can be brought to the desired position without backing the horses, they being made to pull in the right direction. Much time and trouble are saved, and the labor is much easier for the horses.

69 Third. The wagon can easily be drawn out of a cramped posi-

tion. With the ordinary reach, when the forward wheels are so turned that one touches the reach, it operates as a lock, and the whole weight of the load must be lifted before it can be moved. With my reach the wheel cannot hit the axle. To overcome the difficulties I have mentioned, some vehicles have their boxes or beds placed high up on springs, and the reach is not used; but this is very expensive, and the use of the reach also gives much greater strength.

For truck-wagons I use on the upper side of the reach an iron three-fourths of an inch thick and three inches wide, and on the under side I use an iron half an inch thick and three inches wide the same. The bolts pass through the reach and through the irons on the opposite sides of the reach.

Having thus fully described my invention, what I claim as new,
70 and desire to secure by letters-patent, is as follows:

1. A curved or bent reach, when so constructed that the line of draught is the same as in the straight reach, and so that the reach rests on and is supported by the sway-bar, as in the ordinary reach, substantially as and for the purposes set forth.

2. The curved reach A, in combination with the iron E of the sway-bar, when such iron is extended and so constructed as to furnish a support for the reach in all positions, substantially as and for the purposes mentioned.

EDWARD F. FLOOD.

Witnesses:
E. B. SHERMAN.
E. A. WEST.

71 SCHEDULE "G."—*Decree.*

United States circuit court, northern district of Illinois.

AUGUST 2*d*, *A. D.* 1871.

Present the Hon. Henry W. Blodgett, district judge.

PHILIP HICKS
vs.
GEORGE KELSEY. } In chancery.

This cause having been brought on to argument upon the pleadings and proofs therein, and having been argued by Mr. S. A. Goodwin, on behalf of the complainant, and by Mr. A. C. Story, on behalf of the defendant, and due deliberation having been had, it is now at this day, ordered, adjudged, and decreed that the complainant's bill of complaint be, and the same hereby is, dismissed with costs to be taxed, and that said defendant have execution therefor.

And the said complainant thereupon prays an appeal from the said decree to the Supreme Court of the United States, and said appeal is allowed on filing the usual bond with surety in the penalty of one thousand dollars, approved by one of the judges of this court.

72 SCHEDULE "H."—*Appeal bond.*

Know all men by these presents that we, Philip Hicks and William Collins, are held and firmly bound unto George Kelsey, of Chicago, Illinois, in the sum of one thousand dollars, to be paid to the said George Kelsey, his heirs, executors, administrators, and assigns; to which pay-

ment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals respectively, and dated this tenth day of August, A. D. 1871.

Whereas Philip Hicks has prosecuted an appeal to the Supreme Court of the United States, from a decree of the circuit court of the United States for the northern district of Illinois, rendered in the case of Philip Hicks, complainant, and George Kelsey, defendant:

Now, therefore the condition of this obligation is such, that if
73 the above-named Philip Hicks shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise shall remain in full force and virtue.

PHILIP HICKS.
WILLIAM COLLINS.

Signed & sealed in presence of—
JOHN H. WHIPPLE.

Approved:

H. W. BLODGET.

(Endorsed: Filed August 10, 1871.

74 On this day, to wit, the 22d day of November, A. D. 1871, the following notice was filed in said court, with the clerk thereof, to wit:

Notice to supply lost record.

Circuit court of the United States, northern district of Illinois.

PHILIP HICKS
vs.
GEORGE KELSEY. } In chancery.

SIR: You will please to take notice that an application to supply the record in this cause as lost and destroyed, has been entered of record in this court, a copy of which is hereto annexed, and that the same will be heard by said court on the twenty-third day of January, 1872.

Yours, &c.

GOODWIN, LARNED & TOWLE,
Sol'rs for Compl't.

To GEORGE KELSEY, Esq.

CHICAGO, *November 22nd*, 1871.

75 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

John H. Whipple, of the city of Chicago, being duly sworn, says that, on the twenty-second day of November, A. D. 1871, he served a copy of the within notice, and a copy of the application therein referred to upon George Kelsey, the defendant in the above-entitled cause, by handing the same to him personally.

JNO. H. WHIPPLE.

Subscribed & sworn to this 22d day of November, A. D. 1871, before me.

W'M H. BRADLEY, *Clk.*

(Endorsed:) Filed Nov. 22d, '71. W'm. H. Bradley, cl'k.

76 On this day, to wit, the 23d day of January, A. D. 1872, in the record of the proceedings of said court in chancery, in said cause, appears the following entry, to wit:

77 *Order supplying lost records.*

PHILIP HICKS
vs.
GEORGE KELSEY. } Chancery, Jan'y 23.

Now at this day comes the said complainant, by Goodwin, Larned & Towle, his solicitors, and it appearing to the court from the petition of the said complainant, verified by affidavit that the papers and records in said cause were, without fault of said complainant, destroyed by fire on the ninth day of October last, and that no certified copies thereof were extant; and it further appearing to the court, from the proofs now here exhibited in open court, that the papers filed herein on the twenty-second day of November last, marked Schedule A, B, C, D, E, F, G, & H, are substantial copies of the record in this cause; and it further appearing from the affidavit of service on file that a copy of the petition herein was served on the defendant on the twenty-second day of November last, more than sixty days since, with notice of motion for this day, it is therefore ordered and considered that said copies, respectively marked Schedules A, B, C, D, E, F, G, & H, be substituted for and henceforth deemed and taken as the said record in this cause, in lieu of that destroyed, and that this cause be redocketed and proceed accordingly.

78 The stipulation of the parties in said cause extending time to return record is in the words and figures following, to wit:

Stipulation extending time of return.

U. S. circuit court.

PHILIP HICKS
vs.
GEORGE KELSEY. } In Sup. C't, on appeal.

It is agreed that the appellant in this case, Philip Hicks, may have sixty days, after the first day of the December term of the Supreme Court of the United States, in which to procure and file the clerk's return on the appeal taken therein, & with the same force and effect as if filed during the first week of said term.

Dated Chicago, Nov. 9, 1871.

STOREY AND KING,
Sol'rs for Appellee, 149 *W. Washington.*

GOODWIN, LARNED & TOWLE,
Sol'rs for Appellant.

79 NORTHERN D. OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the whole of the record of proceedings had in said court in said entitled cause of Philip Hicks,

complainant, against George Kelsey, defendant in chancery, as the same now appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in Chicago, in said district, this twenty-seventh day of January, in the year of our Lord, eighteen hundred and seventy-two, and of our Independence the ninety-sixth year.

[SEAL.] W'M H. BRADLE , *Clerk.*

5-ct. int.-rev. stamp, canceled.]

(Indorsement on cover:) No. 347. Philip Hicks, appellant, vs. George Kelsey. N. Illinois C. C. U. S. Filed 16th February, 1872.

REC. 347—3

Supreme Court of the United States.

PHILIP HICKS,
Appellant,
vs.
GEORGE KELSEY,
Appellee.

STATEMENT OF THE CASE.

This action is a bill in equity by Philip Hicks, brought against the defendant, George Kelsey, in the Circuit Court in the Northern District of Illinois, for an alleged infringement of a patent granted to the complainant, Hicks, October 27, 1868, for an "IMPROVED TRUCK AND WAGON REACH."

The bill was filed in July, 1869. The defendant's answer denied the whole bill, alleging in due form—

1st. That the claim upon which the complainant's patent and bill rest, viz:

"The reach made of two wooden parts, A, B, connected by a metallic curved splice, consisting of separate

plates, P, P, or of solid piece, K, the whole arranged substantially as and in the manner herein set forth and specified —"

Does not present any patentable subject under the statute.

2d. That the complainant is not the first and original inventor thereof.

3d. That the defendant has not infringed the said patent.

A general replication was filed, and the cause brought to argument, on pleadings and proofs, before the Hon. Henry W. Blodgett, District Judge of the Northern District of Illinois, who, on August 2d, 1871, dismissed the complainant's bill with costs. No formal opinion was delivered or filed, Judge Blodgett remarking from the bench that this was a very close case on the patentability of the invention claimed, undoubtedly to be appealed, and that in such cases he thought the complainant, having the affirmative, should bring the appeal, and he, therefore, dismissed the bill.

ASSIGNMENT OF ERRORS.

The court erred in entering a decree dismissing the complainant's bill in this cause:

1st. Because the invention claimed by the complainant is a new and useful improvement, patentable under the Acts of Congress.

2d. Because it appears from the record that Hicks was the original and first inventor of the invention claimed in his patent.

3d. Because the infringement by the defendant is established in this case, upon the record, beyond a doubt.

BRIEF OF APPELLANT'S ARGUMENT.

POINT I.

The appellant's patent stands on what he claims as an *improvement* in the construction of a curved or crooked wagon reach.

Wagon reaches had been made with an upward crook or curve to permit the forward wheel to pass under. They were made of wood, necessarily of considerable thickness for strength, and of the same size throughout, and consisted of one continuous piece connecting the front and rear axle-trees of the wagon and braced by thin side plates from end to end.

Such a reach is shown in the patent of E. F. Flood, Oct. 15, 1867, in this case (Record, pages 19, 20), and is in fact old and held to be public property.

Flood v. *Hicks* 4 Fisher, 156.

Model No. 5 (life size) represents it. It was upon such a reach that Hicks undertook to improve.

His claim is, (see patent) (Record, pages 5 and 6) :

"THE REACH MADE OF TWO WOODEN PARTS, A, B, CONNECTED BY A METALLIC CURVED SPLICE, CONSISTING OF SEPARATE PLATES, P P, OR OF SOLID METALLIC PIECE, K,

"THE WHOLE ARRANGED SUBSTANTIALLY AS AND FOR THE "PURPOSE SET FORTH."

This invention does not consist in the mere substitution of a particular material for other material which had been previously used for the same purpose and in the same way.

The invention consists in the production of a certain described article by a certain described mechanical process, which process, viewed as a whole, is new in itself.

That process is, the making an ordinary wooden reach of two separate parts, in splicing those parts at the front and rear ends by a particular and new mechanical arrangement (shown in the drawing, page 5, and in the models, No. 1 and No. 3), to a curved metallic intermediary splice, made substantially solid in two plates, or one casting, so that a new article is produced by a new mechanical arrangement or device—a new curved reach.

This article has added advantages and increased utility over the old wooden curved reach improved upon.

Some of these advantages are suggested in the patent. They are most clearly shown in the proofs.

(ELLSWORTH): "Hicks' invention is specially applicable in converting old straight reaches into curved ones, in cheapening the production of curved reaches and facilitating their repair." (Ellsworth, Record, page 9.)

(PHALEN): "Hicks has made thirty-five or forty of his reaches since 1868. Never knew one brought back broken.

The plates are stronger bolted together." (Phalen, page 13.)

(ANDERSON): "Flood never put his plate on the side *as wide* as the wood. Flood's reach was all the same size of wood from hind to front axle. In Flood's the reach is entire from the hounds to the rear, and is a wooden reach with supporting plates, thin compared with the wood. In Hicks' reach, the two plates are bolted together so as to make them substantially solid." (Anderson, page 14.)

(YOUNG knows Flood reach): "My experience is that the wood between the plates in summer contracts and loosens the bolts. The Flood reach I speak of required $100 for repairs. It has been repaired by Flood twice, Martin once, and Hicks once. The reach was out of order. I think Hicks' reach is stronger than Flood's." (Caryl Young, Record, page 16.)

(BULL): "The advantage of Hicks' reach, model No. 3, is, that being iron, the two plates come together as one whole substantially soldered. In the wooden one, the moment the shrinkage becomes such that the bolts become loose, each has to take its own part, and the transit of the trucks moving from the right to the left, turning the friction from that, takes each separate strain from one and throws it on to the other, so it makes only the thickness of the one side—the one piece of iron—where otherwise it would be two plates together. The crooked part right at the crook would break, according to that arrangement, because the other part is stronger. It will break, whenever it gets so it will vibrate, at the weakest

point. In the wooden reach I saw the bolts were loose from the shrinkage of the wood. Found the bottom plates broken in the wooden one. Is machinist." (John H. Bull, Record, pp. 16, 17.)

(JAMES HORRIGAN): "Has used Hicks' iron reach and also a wooden one strapped with iron. The iron reach is the best. When you get on a load with the wooden one in a sidling place, as you turn around the wheel will strike the reach and catch and the wood springs and gives way; and the bolt in the wooden one would get loose from shrinking off the wood. I have had to tighten them up many times." (Horrigan, Record, page 16).

(WIGHT): "In the wood (reach) there is shrinkage in the thickness and the iron becomes loose, the bolts commence to work, and it is bound to break down at the lowest bolt at the forward or upper end of the curve. I have seen two of these reaches break already." (Wright, Record, page 17).

(P. HICKS): Patentee—Knew Flood and seen his reach before I made mine. Think wood an injury between the plates, as stated, as iron expands and contracts with heat and cold, lengthwise, and wood shrinks and swells sidewise with dry and wet. I use wood front and rear for lightness, and a better bearing. I don't claim the invention of a crooked reach, but my improvement. I have made and put in use about forty-five reaches since, under my patent. (Philip Hicks, Record, page 15.)

This *new material* in the crook or curve; with the *new method of attachment* at each end (the splice) to the two

wooden parts; with the *new construction* of the reach as a whole; with the *new operation* in consequence of the change; with the *increased utility* and *beneficial results*, thus incontestably proved, bring this patent within the principle of all the cases as a patentable invention under the Act of July, 1836.

Curtis on Patents, 3d Ed., §§ 34, 35, 36, 73.
McCormick v. *Seymour*, 2 Blatch., 243—*definition patentable subject by Nelson, J.*
Roberts v. *Dickey*, 4 Fisher, 532.

In this last case Mr. Justice Strong, citing Curtis, holds:

"There are many cases in which the materiality of an invention, whether it be a machine or a process, can be judged of only by its effect on the result, and this effect is tested by the actual improvement in the process of producing an article, or in the article itself introduced by the alleged invention"

So, also, Webster, on the subject matter of patents, page 30:

"The utility, then, of the change, as ascertained by its consequences, is the real practical test of the sufficiency of an invention, and since the one can not exist without the other, the existence of the one may be presumed on proof of the existence of the other."

Mr. Curtis also (§ 73) says:

"It is not to be laid down broadly that the use of one material in place of another in a manufactured vendible

article or a machine, can never be the subject of a patent. If such substitution involve a new method of attachment or construction, or leads to any new mode of operation, or develops a new application of the properties of matter, so as to change the use of the manufacture or machine, there may be in the use of the new material a patentable invention."

In the comparatively recent case of

Seymour v. *Osborne*, 11 Wallace, 516,

this court tersely summed up the rule as follows:

"Changes in the construction and operation of an old "machine, so as to adapt it to a new and valuable use "which the old machine had not, are patentable, and may "consist either in a material modification of old devices "or in a new and useful combination of the several parts "of the old machine."

We submit with confidence that it is impossible to read the proofs referred to in this case, in the light of these well-settled principles of patent law and good sense, without the inevitable conclusion not only that Hicks' claim is valid as a patentable improvement and invention, but also that he himself deserves the credit due to a meritorious and useful inventor.

The fact that forty-five of these truck reaches have been brought into use and sold in the Chicago market alone, within two years from the date of the patent, is significant and almost controlling.

There are many patents sustained in the books that stand upon ground far narrower than this one of Hicks'.

The case of *Crane* v. *Price*, in English law (Webster's Pat. Cases, 409), is no greater in the change of material and new device. It was substituting anthracite instead of bituminous coal in combination with a hot air blast, as the bituminous coal had before been used.

The court find (page 410):

"Upon looking at the evidence, we think there is no doubt that the result of the combination of the hot blast with the anthracite on the yield of the furnaces was more, the natural properties and quality of the iron better, and the expense of making the iron less than it was under the former process by means of the combination of the hot blast with the bituminous coal."

On this ground the patent was sustained.

In *McCormick* v. *Seymour*, *supra*, the change upon the old divider in a reaping machine was so very slight that the defendant alleged it "so simple and obvious" as not "to be the subject of a patent."

It was upheld *on the proof* that it was *new* and *useful*.

Many other cases might be referred to, all tending to the same point, and supporting the conclusion for which we contend on the facts and principles before stated.

POINT II.

Upon the evidence in this record the appellant Hicks was the original and first inventor of the "thing patented" here.

1. The invention, as claimed, was made complete as early as August 14, 1868, then described and shown, and the full-sized truck completed, sold and put in use Sept. 9, 1868; the application for a patent sworn to August 28, 1868; and the papers and model filed Sept. 2, 1868.

(Test. of John G. Hicks, Record, p. 12; Swanson, p. 13; Philip Hicks, p. 15; Phalen, p. 13.)

2. The only invention put in evidence as prior to Hicks is the patent of Ed. F. Flood, Oct. 17, 1867, (Record, p. 20), and trucks made and used in Chicago of a like description. These are all wooden, curved reaches, with narrow, supporting plates, as shown in complainant's model, No. 5, and Flood's patent. Hicks' invention is the metallic curved reach, as above set forth, and a new and patentable improvement differing from all former wagon reaches. Flood's reach is held to be old and public property, (4 Fisher, 156 *supra*), and in no respect anticipates Hicks' improvement.

3. The defendant's witnesses, Wyman (Record, page 10) and Flood (page 10) stated that they saw and knew of a truck reach *with a crook entirely of iron*, made at Flood's shop in September, 1868. Flood says (page 10): "We afterwards sold it to Richard Manly."

We show in rebuttal by Manly, (Record, page 11), Riches (page 11), Peterson (page 11), Hanahan (page 12), that this Manly truck was commenced in October or November, 1868, and finished from November to January ensuing; was sold to Manly in the spring of 1869, and was the only one of the kind made in Flood's shop, and that Flood, when he began it, admitted (as the fact was) that Hicks then had his patent, and he (Flood) expected to have trouble with Hicks about it. Hicks' invention dates back to August, 1868.

POINT III.

The truck and curved reach of the defendant Kelsey (complainant's model No. 4) is clearly an infringement of Hicks' patent in the first claim above set forth, under Point I.

1. This Court has given a comprehensive rule in *Winans* v. *Denmead*, 15 Howard, 343:

"Where form and substance are inseparable, it is enough to look at the form only. Where they are separable; where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found, there is an infringement, and it is not a defense that it is embodied in a form not described, and in terms claimed by the patentee."

Nor will it prevent this conclusion, that the defendant

adds something to the invention or machine, when the change introduced by the defendant constitutes a mechanical equivalent in reference to the means used by the patentee.

Johnson v. *Root*, 1 Fisher, 359.
Pitts v. *Wemple*, 2 Fisher, 10.
Foss v. *Herbert*, 2 Fisher, 31.
Tilghman v. *Werk*, 2 Fisher, 242.

"A question of infringement is best determined by the Court by a comparison of a defendant's machines with mechanism described in patent, and of their modes of operation."

Seymour v. *Osborne*, 11 Wallace, 516 *supra*.

2. Under this rule, on the facts, the infringement in this case is plain, and in truth was scarcely disputed on the hearing.

The defendant, appellee, uses two thick metallic side plates for the curve of the reach, braced by an upper and lower intermediate thick plate, so as to make a perfect curved metallic reach, with the plates bearing against each other, as if the same was solid, and with precisely the same results and effect, and in precisely the same way as Hicks. This metallic curve is connected with, or spliced by, a mechanical arrangement, similar to Hicks', at each end, with the two wooden parts of the reach fixed to the front and rear axle-tree, thus forming the reach, as a whole, like Hicks'. A slight hollow is left in the reach, either for good or ill, or for evasion. A thin strip of wood of about an inch through in thickness, is put into this hollow. We say this is for ill, and for evasion.

If this strip was continuous through and united to the frame and hounds front and rear, it would afford no strength to the reach, and would be a positive injury. This is the testimony. Young, (Record, page 16); Bull, (page 17); Ellsworth, (page 9), as to small model 2, (the same as No. 4), which the witness says contains Hicks' invention.

3. But the defendant made some effort to show that the thin inch strip in his (Kelsey) reach did run continuously through, and was joined at the front and rear ends of the curve. Wharton, (Record, page 10), Hayden, (page 11.)

Unfortunately for this theory, the actual removal of the plates discovers the contrary.

On the night of Nov. 21, 1870, John G. Hicks got the defendant's wagon and truck and took it to Hicks' shop, and with Philip Hicks, John Anderson and Martin Maginnis, took it to pieces, and found that the strip of inch wood did not run through, but was entirely disconnected in the rear, with a space between it and the wooden rear frame and not connected in front. A perfect *fac simile* model was made of it, and is proved as model No. 4, and is now here before the court, showing the whole thing. (Testimony of J. G. Hicks, Record, page 12: Anderson, page 14: Maginnis, pages 14, 15; Philip Hicks, page 15.)

If this were not absolutely true, the defendant would have been produced with his truck bodily and proved it, and subjected it as an exhibit to the inspection of the court.

Nothing of this sort was done, and we are justified in saying, therefore, that this strip was put in as a mere disguise and evasion. All our witnesses concur that it is useless and injurious.

But whether of any benefit or not, in reference to the bolts, the fact of this disconnection both in front and rear, leaves Kelsey's truck and curved reach simply Hicks' metallic curved reach without disguise or possibility of contradiction.

4. The defendant undertook in his evidence to show that his (Kelsey's) truck and reach was made under and like Flood's patent, and by one of Flood's licenses, referring to Flood's drawing. (Wyman, Record, page 10: Flood, page 10; Hayden, page 11.)

But an inspection of Flood's patent and drawing, (Record, page 20) and the actual models, No. 3 of Flood and No. 4 of Kelsey, absolutely contradict this verbal assertion of these witnesses. It is not Flood's but Hicks', and was brought out in 1869 (Wyman), when Hicks' patent was public and notorious in Chicago.

We submit that the decree dismissing the bill in this case should be reversed, and the usual decree ordered for the appellant.

GOODWIN, LARNED & TOWLE,

Solicitors for Appellant.